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The Immunities of Public Officials under International Law

INTRODUCTION

The then ICJ Judge Awn Shawkat Al-Khasawneh defined immunity "[as] ... an exception from the general rule that man is responsible legally and morally for his actions."[1] While it is widely acknowledged that serving high-ranking public officials enjoy immunity from the jurisdiction of foreign courts in most circumstances, there is an ongoing debate regarding how far the immunity entitlement extends and whether there are exceptions to it, particularly in cases of serious criminal wrongs. The present chapter reviews the conceptual, doctrinal, and theoretical foundations of the immunities of foreign officials, and their subjective, material, and temporal scopes. It also examines the rules that govern situations when foreign official immunity may not apply or may apply only to official acts, and the conditions for either of these outcomes. The chapter draws from recent developments in international criminal law, international human rights law, and transnational criminal law, and builds on the influential contribution of the ILC on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction" included in the long-term program of work of the commission in 2006.[2] Relevant judicial decisions are utilized in order to demonstrate how international and national courts have sought, with varying degrees of success, to reconcile considerations of sovereign equality, dignity, and independence of states with the administration of justice, accountability, and victim restitution.

[1] International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the *Congo v. Belgium*), Judgment, Dissenting Opinion of Judge Al-Khasawneh, ICJ Rep. 2002, 95, para. 3.

[2] ILC, *Report of the Planning Group*, Doc. No. A/CN.4/L.704 (International Law Commission, 2006), para. 4.

1.1 CONCEPTUAL, DOCTRINAL, AND THEORETICAL FOUNDATIONS OF INTERNATIONAL IMMUNITIES

Foreign official immunities or immunities from foreign jurisdiction exist to enable foreign or international public officials to carry out their functions free of external interference or undue pressure. They are primarily available to heads of state or government, ministers for foreign affairs, as well as senior diplomats and consuls, and high-ranking UN staff and personnel of international organizations. These immunities are governed by both customary and treaty international law.

The foreign official immunity doctrine commonly applies coextensively with the doctrine of personal inviolability – the "absolute physical privilege" of an individual, such as non-amenability to arrest and search.[3] There is a strong inclination to conflate immunity and inviolability as a result of their coextensive nature.[4] For instance, foreign official immunity commonly means exclusion of public officials from the jurisdiction of foreign courts, but it may also mean personal inviolability that entails physical protection of public officials from enforcement processes in a foreign jurisdiction unless their own governments consent to them.[5] The foreign official immunity doctrine also incorporates freedoms and privileges that are meant to facilitate the work of immunity-protected individuals on their official missions abroad. The most common freedoms are freedom of movement within the territory of the host state and freedom of communication between state officials and their governments.

1.1.1 *Immunity from Jurisdiction versus Jurisdiction*

Essentially, foreign official immunity is immunity from jurisdiction. In considering the basis for, and the scope of, foreign official immunity, it is thus important to address how jurisdictional immunity differs from jurisdiction.

Despite its prominence in customary international law and within international treaties, there is no universally agreed-upon definition of immunity

[3] Thomas Weatherall, "Inviolability Not Immunity: Re-Evaluating the Execution of International Arrest Warrants by Domestic Authorities of Receiving States," *Journal of International Criminal Justice* 17, no. 1 (2019): 45–76 ("Immunity *ratione personae* from foreign criminal jurisdiction is often understood as comprising inviolability").

[4] Ibid., 51.

[5] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Leiden: Brill Nijhoff, 2015), 27.

from jurisdiction in international law. Some definitional considerations can be found in the 1980s ILC reports on jurisdictional immunities of the state authored by Special Rapporteur Sompong Sucharitkul. He conceptualizes jurisdictional immunity as an "absence or lack of power, or necessity to withhold or suspend the exercise of such power."[6] He specifies the conceptual scope of the term as the "non-existence of power" or "non-amenability"[7] to the jurisdiction of the national authorities of another state.[8] A jurisdictional immunity of public officials is, therefore, a restraint that limits the ability of one state to assert adjudicatory and/or enforcement jurisdictions over persons, conduct, or assets representing, defining, or belonging to another state, where such jurisdictions may otherwise exist.[9] An ILC memorandum expands on this point as follows:

> If jurisdiction is concerned with the exercise by a State of its competence to prescribe, adjudicate or enforce laws, the concept of immunity seems to seek to achieve a reverse outcome, namely the avoidance of the exercise of jurisdiction and a refusal to satisfy an otherwise legally sound and enforceable claim in a proper jurisdiction.[10]

The rules governing foreign official immunity need to be separated from the rules regarding the jurisdiction of national courts. These are two distinct norms of international law. This said, any consideration of foreign official immunity presupposes the existence of a lawful or competent jurisdiction of the forum state based on the established principles of international law. A court may not be able to establish jurisdiction over a person regardless of their immunity status if there are no grounds for establishing jurisdiction over an act in the first place.[11] In *Arrest Warrant*, Judges Higgins, Kooijmans, and Buergenthal pointed out that jurisdictional immunities of public officials and jurisdiction are "inextricably linked" and that "if there is no jurisdiction *en*

[6] ILC, *Second Report on Jurisdictional Immunities of States and Their Property by Special Rapporteur Sompong Sucharitkul*, Doc. No. A/CN.4/331 (International Law Commission, 1981), para. 17.

[7] Ibid.

[8] Ibid., 23.

[9] Ibid., para. 17.

[10] ILC, *Memorandum by the Secretariat. Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/596 (International Law Commission, 2008), para. 14. Also see International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the *Congo v. Belgium*), Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, ICJ Rep. 2002, 63, para. 5.

[11] Neil Boister, *An Introduction to Transnational Criminal Law*, 1st ed. (Oxford: Oxford University Press, 2012), 153.

principe, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise."[12] This also means, however, that if a state has established jurisdiction over certain conduct, it may nevertheless be unable to enforce it if the individual is immune to it under international law. The simple logic here is that "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."[13]

1.1.2 *Sovereign Equality, Dignity, and Independence of States*

States can only act through their agents, such as heads of state and government, ministers for foreign affairs, or diplomats. Because these offices commonly embody the dignity and sovereignty of the state itself, foreign official immunities available to individuals occupying these positions are closely intertwined with sovereign (state) immunity. The very rationalization and application of foreign official immunity is traceable to the legal norm of the sovereign equality of states,[14] which is dictated by article 2(1) of the Charter of the United Nations (henceforth "UN Charter").[15] It is premised on the Latin maxim *par in parem non habet imperium* – "an equal does not have power over an equal" – and reflects the idea that all independent states are juridically equivalent.[16] Accordingly, one state may not exercise its power in any form on the territory of another state.[17] The rationale behind the armor of immunity that protects state officials under international law is to "ensure respect for the principle of the sovereign equality of States" and to "prevent interference in their internal affairs."[18] This is done to "guarantee the proper functioning of

[12] International Court of Justice, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in *Arrest Warrant*, ICJ Rep. 2002, 63, para. 3.

[13] International Court of Justice, *Judgment in Arrest Warrant*, ICJ Rep. 2002, 3, para. 59.

[14] Sompong Sucharitkul, "Immunities of Foreign States before National Authorities," in *Recueil Des Cours: Collected Courses of the Hague Academy of International Law (1976)*, vol. 149 (Leiden: A. W. Sijthoff, 1977), 94.

[15] Charter of the United Nations, June 26, 1945 (entered into force October 24, 1945), 1 UNTS XVI ("The Organization is based on the principle of the sovereign equality of all its Members").

[16] ILC, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Special Rapporteur Roman A. Kolodkin*, Doc. No. A/CN.4/601 (International Law Commission, 2008), para. 123. Also see International Court of Justice, Jurisdictional Immunities of the State (*Germany v. Italy*: Greece Intervening), Judgment, ICJ Rep. 2012, 99, para. 57; Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford: Oxford University Press, 2014), 10.

[17] Matthias Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (Leiden: Brill Nijhoff, 2010), 21.

[18] ILC, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Special Rapporteur Concepción Escobar Hernández*, Doc. No. A/CN.4/661 (International Law

the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system."[19] The sovereign equality of states is also coalesced with another Latin maxim *par in parem non habet iurisdictionem*, which declares "equals have no jurisdiction over each other."[20] Following this principle, one state shall not be subject to the jurisdiction of another state, and no domestic court may exercise jurisdiction over a foreign sovereign.[21]

The foreign official immunity doctrine also draws from the principles of the dignity and independence of states. US Chief Justice John Marshall elaborated on the importance of the respect of state sovereignty and the dignity of states in his opinion in *The Schooner Exchange* case in 1812,

> One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[22]

With these considerations, one can hardly speak of the jurisdictional immunity of officials who are representing states that are not recognized, or are only partially recognized, as sovereign. In proceedings against semi-sovereign states or states that are not completely recognized as such, immunity from foreign jurisdiction has been denied.[23] The same reasoning applies with reference to the subject of the immunity of unrecognized heads of state or heads of government.[24]

Commission, 2013), para. 48. Also see ILC, *Fourth Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Special Rapporteur Concepción Escobar Hernández*, Doc. No. A/CN.4/686 (International Law Commission, 2015), para. 102.

[19] International Court of Justice, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant*, ICJ Rep. 2002, 63, para. 75.

[20] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford: Oxford University Press, 2009), 214.

[21] Ibid.

[22] Supreme Court, *The Schooner Exchange v. McFaddon Others*, 11 US 116 (1812), 137.

[23] ILC, *Preliminary Report by Special Rapporteur Kolodkin*, paras. 122–24; ILC, *Memorandum*, para. 109.

[24] See District Court for the Eastern District of New York, *Lafontant v. Aristide*, 844 F. Supp. 128 (EDNY 1994) ("[T]he immunity extends only to the person the United States government acknowledges as the official head-of-state. Recognition of a government and its officers is the exclusive function of the Executive Branch. Whether the recognized head-of-state has de facto control of the government is irrelevant"), 132.

1.1.3 *International Comity and Reciprocity*

One intriguing aspect of the foreign official immunity doctrine is whether immunities of officials constitute a juridical right of a state not to be amenable to legislative, executive, or judicial acts of another state or an act of comity exercised by states to exempt foreign states from its jurisdiction out of mutual respect. This matter was discussed in some detail by the ILC, whose Special Rapporteur Roman Kolodkin posited in his 2008 report that the predominant approach to immunity in international law is to view it as the right not to be subject to jurisdiction.[25] From this right-based perspective, the jurisdictional immunity of states, and by extension of their representatives, entails a legal relationship of rights and duties.[26] It presupposes a "juridical obligation" of states as opposed to a mere preference or goodwill of the foreign state not to exercise jurisdiction over foreign state officials.[27]

The alternative view on the issues is that immunity is not a question of the rights of states but a matter of their discretionary power that rests on considerations of international comity and reciprocity.[28] Instead of interpreting the entitlement to immunity as a juridical right as suggested by Kolodkin, this view contends that the international legal regime of the jurisdictional immunities of public officials is the outcome of a permissive respect-based decision of a state not to exercise its power in relation to the other state and its representatives.[29] From this alternative point of view, foreign official immunity is construed as a "self-imposed restriction" by states on the jurisdiction of their courts with respect to foreign state officials.[30]

For instance, US courts have consistently interpreted foreign sovereign (state) immunity, and derivatively, the immunity of foreign state officials, as arising out of international comity. The US Supreme Court in *Altmann*, for example, described foreign sovereign immunity as a "gesture of comity" that

[25] ILC, *Preliminary Report by Special Rapporteur Kolodkin*, para. 58.
[26] Sucharitkul, "Immunities of Foreign States before National Authorities," 95.
[27] ILC, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Special Rapporteur Roman A. Kolodkin*, Doc. No. A/CN.4/631 (International Law Commission, 2010), footnote 10.
[28] Jasper Finke, "Sovereign Immunity: Rule, Comity or Something Else?" *European Journal of International Law* 21, no. 4 (November 1, 2010): 870.
[29] Lori Fisler Damrosch, "The Sources of Immunity Law – Between International and Domestic Law," in *The Cambridge Handbook of Immunities and International Law*, eds. Luca Ferro, Nicolas Angelet, and Tom Ruys (Cambridge: Cambridge University Press, 2019), 43–45.
[30] ILC, *Preliminary Report by Special Rapporteur Kolodkin*, 168, 173; William S. Dodge, "International Comity in American Law," *Columbia Law Review* 115, no. 8 (2015): 2071–141.

protects from the "inconvenience of suit"[31] and used comity to explain why foreign governments should be allowed to bring suit as plaintiffs in US courts. In *Verlinden*, with a reference to *The Schooner Exchange* case, foreign sovereign immunity is also portrayed as "a matter of grace and comity on the part of the United States."[32] With this reasoning, the court in the *Verlinden* case noted that despite the "restrictive" theory of foreign sovereign immunity adopted in some US court decisions following the so-called Tate Letter,[33] political considerations made it possible to grant immunity from US courts in cases where "immunity would not have been available under the restrictive theory."[34] Following a very similar reasoning, in *Flatow v. the Islamic Republic of Iran*, the District Court of Columbia remarked, "[l]ike foreign sovereign immunity, head of state immunity is a matter of grace and comity, rather than a matter of right."[35]

Some scholars suggest the middle ground between these two contrasting positions, arguing that in practice foreign official immunity is not applied in isolation and may be the outcome of several rationales. Lori F. Damrosch maintains that the practice of granting immunity to foreign public officials may commence as a gesture of courtesy to foreign sovereigns and later progress into an obligation of one state owed to juridically equal states under customary international law.[36]

Whether foreign official immunity is a matter of jurisdictional right or not, international comity cannot be fully understood without consideration of reciprocity. In fact, it has been argued that international comity is conditioned upon reciprocity among nations.[37] Reciprocity plays a pivotal role

[31] Supreme Court, *Republic of Austria v. Altman*, 541 US 677 (2004), 678.
[32] Supreme Court, *Verlinden B.V. v. Central Bank of Nigeria*, 461 US 480 (1983), 486.
[33] The State Department published its policy regarding the submission of suggestions of immunity in lawsuits brought against foreign sovereigns in the Tate Letter on May 19, 1952. According to the letter, the department would start using a restrictive theory of sovereign immunity. This meant that it would submit a suggestion of immunity if the case resulted from the foreign government's or its agents' purely governmental acts (*jure imperii*) but would deny immunity in cases where the acts had a commercial or proprietary character and which could be made by any person or entity (*jure gestionis*). See John P. Grant and J. Craig Barker, *Parry & Grant Encyclopaedic Dictionary of International Law*, Fourth Edition (Oxford: Oxford University Press, 2009), 592.
[34] Supreme Court, *Verlinden B.V. v. Central Bank of Nigeria*, 461 US 480, 487.
[35] District Court for the District of Columbia, *Flatow v. Islamic Republic*, 999 F. Supp. 1 (DDC 1998), 24.
[36] Damrosch, "The Sources of Immunity Law," 43.
[37] Sucharitkul, "Immunities of Foreign States before National Authorities," 119.

in harmonizing the interests of states with their obligations.[38] It developed prominence due to the horizontal nature of the international system with no overarching legal authority and no compulsory jurisdiction to enforce agreements or resolve disputes between states. In *Tachiona*, District Judge Marrero articulated reciprocity to be one of the "bedrock[s] for the doctrine of sovereign immunity."[39] Reciprocity is also cited in other notable US cases, such as *Tabion*, wherein District Judge Ellis acknowledged its indispensable role in diplomatic relations:

> To protect United States diplomats from criminal and civil prosecution in foreign lands with differing cultural and legal norms as well as fluctuating political climates, the United States has bargained to offer that same protection to diplomats visiting this country.[40]

Circuit Judge Murnaghan also stated that refraining from the customary respect for diplomatic immunity could "subject American diplomats to the risk of liability under foreign laws and reduce the efficient performance of their diplomatic missions abroad."[41] He pointed to a certain degree of injustice to victims, stating that by "invoking sovereign immunity, there may appear to be some unfairness to the person against whom the invocation occurs. But it must be remembered that the outcome merely reflects policy choices already made."[42] The US government further justified the preeminence of reciprocity in its statement of interest in *Sabbithi*, "[i]f the US is prevented from carrying out its international obligation to protect the immunities of foreign diplomats, adverse consequences may well obtain . . . and potentially put our diplomats at increased risk abroad."[43]

It is common that the scope of application of international comity and reciprocity considerations is determined in a court of law, but this is not to say that other government branches do not participate in the practical interpretation of the international immunity law. Sucharitkul acknowledged that in

[38] Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," *British Yearbook of International Law* 28 (1951): 220–72 ("The fact that in some countries the grant of immunity from jurisdiction or execution has been made dependent upon reciprocity shows, indirectly, that there is, in the view of these countries, no binding rule of international law on the subject"), 228.

[39] District Court for the Southern District of New York, *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (SDNY 2001), 268.

[40] District Court for the Eastern District of Virginia, *Tabion v. Mufti*, 877 F. Supp. 285 (ED Va 1995), 293.

[41] Court of Appeals, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996), 539.

[42] Ibid.

[43] District Court for the District of Columbia, *Sabbithi v. Al-Saleh*, Statement of Interest of the United States, 07-cv-00115, Docket No. 48 (DDC 2008), 24–25.

some jurisdictions the doctrines of comity and reciprocity deliberated in courts are dictated by the executive branch.[44] When applied in judicial practice, they are meant to prevent courts from issuing judgments or exercising authority in a way that could embarrass the government or place it in an inconvenient situation vis-à-vis its foreign counterparts.[45] In cases of potential unease, US courts, for instance, may receive recommendations from the executive branch and, in response, "will not embarrass the latter by assuming an antagonistic jurisdiction."[46] Accordingly, the practice of some states on the matter of application of foreign official immunity is not confined to judicial decisions and may be dictated by the executive branch.[47]

In the United States, a judicial determination of whether a foreign state official enjoys immunity from US courts is often the outcome of formal suggestions made by the Department of State (henceforth used interchangeably with "State Department").[48] US courts have accepted statements of interest from the State Department, which are indicative of the influence of the executive branch over the judicial branch.[49] In *Verlinden*, the US Supreme Court recognized the common deference of US courts "to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."[50] In his opinion in *Lafontant*, Senior District Judge Weinstein observed that the immunity of foreign heads of state in US courts is "not a factual issue to be determined by the courts."[51]

It is worth noting the State Department may provide suggestions of immunity explicitly or implicitly. One notable example of the latter is the trial of former Panamanian leader Manuel Noriega, accused in the United States of drug trafficking crimes. In *Noriega*, the Eleventh Circuit Court reasoned

[44] William S. Dodge and Chimène I. Keitner, "A Roadmap for Foreign Official Immunity Cases in U.S. Courts," *Fordham Law Review* 90 (2021): 709–14.

[45] Sucharitkul, "Immunities of Foreign States before National Authorities," 120.

[46] Supreme Court, *United States v. Lee*, 106 US 196 (1882), 209.

[47] David P. Stewart, "Immunity and Terrorism," in *The Cambridge Handbook of Immunities and International Law*, eds. Luca Ferro, Nicolas Angelet, and Tom Ruys (Cambridge: Cambridge University Press, 2019), 665.

[48] Erica Smith, "Immunity Games: How the State Department Has Provided Courts with a Post-Samantar Framework for Determining Foreign Official Immunity," *Vanderbilt Law Review* 67, no. 2 (March 1, 2014): 569.

[49] Court of Appeals, *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (holding courts must defer to the State Department's suggestion of immunity even in cases involving alleged violations of *jus cogens* norms).

[50] Supreme Court, *Verlinden B.V. v. Central Bank of Nigeria*, 461 US 480, 486.

[51] District Court for the Eastern District of New York, *Lafontant v. Aristide*, 844 F. Supp. 128, 133.

against the defendant's plea of immunity from jurisdiction even though there was no formal statement on his jurisdictional immunity from the State Department.[52] In response to this landmark decision, critics noted the court should have adopted a "default no-immunity rule," declining to consider the matter itself in the absence of executive branch instructions.[53] By refusing to accept Noriega's plea of the head-of-state immunity, the court instead presumably established a new category of executive suggestion – an indirect expression of intent, reasoning that "by pursuing Noriega's capture and … prosecution, the Executive Branch … manifested its clear sentiment that [he] should be denied head-of-state immunity").[54]

It remains unclear how much deference the executive branch's "suggestions of immunity" and "statements of interest" should receive in US courts. Suggestions of immunity from the State Department have been criticized for inconsistency and void of compatible or uniformly applied considerations.[55]

1.1.4 *Theories of Foreign Official Immunity*

Justifications for foreign official immunity are predicated on three complementary, yet contrasting, legal theories: (i) the extraterritoriality theory; (ii) the representative character theory; and (iii) the functional necessity theory.[56] Although these theories are often presented in the literature as the theoretical bases underpinning diplomatic immunity,[57] the essence of the modern conception of the head-of-state immunity can be argued to embrace the very same notions of extraterritoriality, representative character, and functional necessity.[58]

The extraterritoriality theory, which has been heavily criticized and nearly abandoned as a valid juridical basis for the international immunities of state

[52] Court of Appeals, *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

[53] Adam Isaac Hasson, "Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic," *Boston College International and Comparative Law Review* 25, no. 1 (2002): 145; Bernard Ilkhanoff, "*United States v. Noriega*: The Act of State Doctrine and the Relationship between the Judiciary and the Executive," *Temple International and Comparative Law Journal* 7 (1993): 345.

[54] Court of Appeals, *United States v. Noriega*, 117 F.3d 1206.

[55] See, for example, Shobha Varughese George, "Head-of-State Immunity in the United States Courts: Still Confused after All These Years," *Fordham Law Review* 64, no. 3 (1995).

[56] ILC, *Preliminary Report by Special Rapporteur Kolodkin*, para. 87.

[57] Mitchell S. Ross, "Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities," *American University Journal of International Law and Policy* 4 (1989): 177–80; J. Craig Barker, "Shared Foundations and Conceptual Differentiation in Immunities from Jurisdiction," in *Research Handbook on Jurisdiction and Immunities in International Law*, ed. Alexander Orakhelashvili (Cheltenham, United Kingdom: Edward Elgar Publishing, 2015), 188.

[58] ILC, *Preliminary Report by Special Rapporteur Kolodkin*, para. 97.

officials around the turn of the twentieth century,[59] is based on a legal fiction that the property and officials of a foreign state are to be regarded as outside of the territory of the receiving state while being physically present therein.[60] Officials pursue their daily functions in a foreign state "as if in a bubble of their own State's territory and jurisdiction."[61] This said, foreign official immunity does not automatically replace territorial sovereignty "but rather depends upon the forum State's willingness to recognise the 'fiction of extra-territoriality' upon which such immunity rests."[62]

The representative character theory is applied based on the presumption that foreign state officials personify the sovereign state. This theory dictates that the receiving state should treat foreign state officials as if they were "the collective power of the State" that sent them and "its chief organ and representative in the totality of its international relations"[63] when they act as representatives of the state in international relations. In other words, the immunities from foreign jurisdiction afforded to heads of state and high-ranking state officials are derivative from the representative character of their official mandates. Therefore, "[a]n affront to the representative of a sovereign state under this theory constitutes an affront to the foreign state itself."[64]

The third theory, which has been accepted most widely, is the theory of functional necessity.[65] This theory is grounded on the premise that foreign state officials can successfully perform their functions only if they are protected from undue interference and influence and are thus exempt from foreign jurisdiction. The functional necessity theory promotes the idea that the jurisdictional immunities protect foreign state officials "by virtue of the functions or tasks that each of them performs within his or her hierarchical official relationship with the State."[66] The functional necessity theory informed the decision of the landmark *Arrest Warrant* case, in which the

[59] Ross, "Rethinking Diplomatic Immunity," 178; Veronica Maginnis, "Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations," *Brooklyn Journal of International Law* 28, no. 3 (2003): 994–95.

[60] Supreme Court, *The Schooner Exchange v. McFaddon Others*, 11 US 116 ("The household of an ambassador is supposed to be within the territorial jurisdiction of his sovereign"), 127.

[61] Barker, "Shared Foundations and Conceptual Differentiation in Immunities from Jurisdiction," 188.

[62] Chimène I. Keitner, "Immunities of Foreign Officials from Civil Jurisdiction," in *The Cambridge Handbook of Immunities and International Law*, eds. Luca Ferro, Nicolas Angelet, and Tom Ruys (Cambridge: Cambridge University Press, 2019), 526.

[63] ILC, *Memorandum*, para. 22.

[64] Ross, "Rethinking Diplomatic Immunity," 177.

[65] ILC, *Memorandum*, para. 23.

[66] ILC, *Second Report by Special Rapporteur Escobar Hernández*, para. 48.

ICJ ruled that ministers of foreign affairs draw their immunity from jurisdiction based on the need to fulfill their functions on behalf of the sending state.[67] The court concluded that serving ministers for foreign affairs have the same kind of expansive immunity from foreign jurisdiction as heads of state or government. Therefore, by issuing the arrest warrant, Belgium was ruled to have violated its legal obligation toward the Democratic Republic of the Congo (DRC) to respect the immunity afforded to Abdoulaye Yerodia Ndombasi under international law.[68] The functional necessity theory was also brought to prominence in a few US court rulings, such as *Lafontant*, which emphasized a head of state is entitled to jurisdictional immunity to "be able to freely perform their duties at home and abroad without the threat of civil and criminal liability in a foreign legal system."[69]

1.1.5 *The Act of State Doctrine*

The Anglo-American act of state doctrine[70] is closely similar to, and may be erroneously made indistinguishable from, the foreign official immunity doctrine.[71] The rationale of the doctrine, however, is not to protect the sovereignty of foreign states but to prudentially promote the prerogative of the forum state's government in sensitive matters of foreign affairs from being tied down by the rulings of its courts.[72] As pronounced in the 1964 ruling in *Banco Nacional de Cuba v. Sabbatino*, "[t]he act of state doctrine . . ., although it shares with the immunity doctrine a respect for sovereign states, concerns the limits for determining the validity of an otherwise applicable rule of

[67] International Court of Justice, *Judgment in Arrest Warrant*, ICJ Rep. 2002, 3, para. 53.
[68] Ibid.
[69] District Court for the Eastern District of New York, *Lafontant v. Aristide*, 844 F. Supp. 128, 132.
[70] For an historical review of the act of state doctrine, see Fausto de Quadros and John Henry Dingfelder Stone, "Act of State Doctrine," in *The Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2013); David Gordon, "The Origin and Development of the Act of State Doctrine," *Rutgers Camden Law Journal* 8 (1977): 595–616.
[71] ILC, *Memorandum by the Secretariat. Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/596 (International Law Commission, 2008), para. 56; Also see ILC, *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Special Rapporteur Concepción Escobar Hernández*, Document No. A/CN.4/701 (International Law Commission, 2016) (The act of state doctrine, "which is not recognized in other legal systems, does not fully coincide with the institution of jurisdictional immunity and is not based on customary international law. However, the fact that its practical effects are at times similar to those of jurisdictional immunity has led to a certain amount of confusion between the two concepts"), para. 29.
[72] ILC, *Preliminary Report by Special Rapporteur Kolodkin*, para. 76.

law."[73] In addition, whereas the foreign official immunity doctrine is of procedural nature and is considered at the pretrial stage, the act of state doctrine enters later – when the court is already exercising its competence during the merits stage.[74]

Under the act of state doctrine, courts generally refrain from passing a judgment on the acts of a foreign state and by extension the acts of the foreign officials who function in its name.[75] The reasoning here is that each sovereign state has complete control over the laws within its borders, and its acts cannot be questioned in the courts of another state.[76] Accordingly, the act of state defense absolves the foreign representative's official acts that take place within a foreign sovereign's territory from the judicial review of the forum court.[77] The act of state doctrine, however, is neither a rule nor a legal obligation before international law.[78]

In *Underhill v. Hernandez*, the act of state doctrine was first recognized in US law.[79] General José Manuel "Mocho" Hernandez took over the city of Bolivar, where plaintiff Underhill resided and oversaw the city's waterworks system, during the 1892 revolution that ousted the previous Venezuelan government. Underhill, a US citizen, requested an exit passport from Hernandez on numerous occasions, but each time he was denied, forcing Underhill to remain in Bolivar. Hernandez finally gave in and allowed Underhill to return to the United States, where the latter filed a lawsuit in a court of law to seek compensation for his unlawful detention in Venezuela. The court ruled Hernandez's actions were those of the Venezuelan government because he had acted in his official capacity as a military commander. Since every sovereign state is required to respect the independence of all other sovereign states, the court declined to hear Underhill's claim against Hernandez based on the act of state doctrine, stating that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[80]

[73] Court of Appeals, *Banco Nacional de Cuba v. Sabbatino*, 376 US 398 (2d Cir. 1964), 438.
[74] ILC, *Preliminary Report by Special Rapporteur Kolodkin*, para. 77.
[75] H. F. van Panhuys, "In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities," *The International and Comparative Law Quarterly* 13, no. 4 (1964): 1194.
[76] Michael Zander, "The Act of State Doctrine," *American Journal of International Law* 53, no. 4 (October 1959): 826–52; Michael Singer, "The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice," *The American Journal of International Law* 75, no. 2 (1981): 283–323.
[77] ILC, *Memorandum*, para. 56.
[78] ILC, *Preliminary Report by Special Rapporteur Kolodkin*, para. 75.
[79] Supreme Court, *Underhill v. Hernandez*, 168 US 250 (1897).
[80] Ibid., 252.

1.2 TYPES OF FOREIGN OFFICIAL IMMUNITIES

Broadly speaking, international law distinguishes two types of immunities: personal immunity (immunity *ratione personae*) and functional immunity (immunity *ratione materiae*). Notwithstanding their differences, these two types of immunities share several notable similarities. The intrinsic character of each boils down to "ensur[ing] respect for the principle of the sovereign equality of States, prevent[ing] interference in their internal affairs and facilitate[ing] the maintenance of stable international relations"[81] by providing the officials and representatives of states with protections to carry out their duties without any external obstruction. These immunities also build on the same doctrinal foundations woven into the doctrine of sovereign (state) immunity. After all, the jurisdictional immunities of state officials do not belong to them but to their states. Foreign official immunity is not an individual right or "personal attribute"[82] but a privilege. Officials merely enjoy the immunity entitlement that the state grants them.[83] "Because it is the state that gives the power to lead and the ensuing trappings of power – including immunity – the state may therefore take back that which it bestowed upon its erstwhile leaders."[84]

The remainder of Section 1.2 will review immunity *ratione personae* and immunity *ratione materiae*, focusing on the categories of persons protected (subjective scope), the types of acts covered (material scope), and the period of time when immunity can be invoked (temporal scope). The analysis is informed by the ILC's work on the topic, including the *Draft Articles on Immunity of State Officials from Criminal Jurisdiction*[85] provisionally adopted by the Commission. A summary of the most notable features of these two types of immunities is presented in Table 1.1 and elaborated in Sections 1.2.1 and 1.2.2.

[81] ILC, *Second Report by Special Rapporteur Escobar Hernández*, para. 48.
[82] Foakes, *The Position of Heads of State and Senior Officials in International Law*, 97–98.
[83] District Court for the Eastern District of New York, *United States v. Tapia*, No. 90 Cr. 097, 1991 WL 148509 (EDNY 1991) (holding diplomatic immunity arising under treaty belongs to the states that are the treaty members. In the absence of a protest by such a sovereign state, an individual has no standing to assert an alleged violation of a treaty).
[84] Court of Appeals, *In re Doe*, 860 F.2d 40 (2d Cir. 1988), 45.
[85] Work in progress. See Analytical Guide to the Work of the International Law Commission at https://legal.un.org/ilc/guide/4_2.shtml#fout. The ILC adopted eighteen draft articles and a draft annex on immunity of state officials from foreign criminal jurisdiction, together with commentaries thereto. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by December 1, 2023. See Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10).

TABLE 1.1. *Comparison of personal and functional immunities from criminal jurisdiction*

Normative elements	Immunity *ratione personae* (personal immunity)	Immunity *ratione materiae* (functional immunity)	Relevant draft articles on immunity of state officials from foreign criminal jurisdiction
Basis for immunity (What is the defining feature?)	Attaches to the status of the holder of immunity by virtue of his or her office	Attaches to the act performed by a state official in an official capacity	**Draft article 2. Definitions** For the purposes of the present draft articles: (e) "State official" means any individual who represents the State or who exercises State functions. (f) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.
Subjective scope (What persons benefit from immunity?)	Heads of state; heads of government; foreign ministers; diplomats and members of missions to international organizations	All state officials involved in carrying out the functions of the state or acting on behalf of the state	**Draft article 3. Persons enjoying immunity *ratione personae*** Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction. **Draft article 5. Persons enjoying immunity *ratione materiae*** State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.
Material scope (What types of acts are covered by immunity?)	Official and private acts	Official acts only	**Draft article 4 Scope of immunity *ratione personae*** 2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government, and Ministers

(*continued*)

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TABLE 1.1. (*continued*)

Normative elements	Immunity *ratione personae* (personal immunity)	Immunity *ratione materiae* (functional immunity)	Relevant draft articles on immunity of state officials from foreign criminal jurisdiction
			for Foreign Affairs during or prior to their term of office. **Draft article 6. Scope of immunity *ratione materiae*** 1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
Temporal scope (Over what period of time can immunity be invoked and applied?)	Any act performed prior to and during term of office	No time limit, but functional immunity does not extend to acts performed prior to taking office	**Draft article 4. Scope of immunity *ratione personae*** 1. Heads of State, Heads of Government, and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office. 3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*. **Draft article 6. Scope of immunity *ratione materiae*** 2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials. 3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

1.2.1 *Personal Immunity (Immunity* Ratione Personae)

Personal immunity or immunity *ratione personae* provides the fullest level of protection bestowed to foreign public officials. It attaches to particular offices rather than to individuals serving within them, exempting officeholders from foreign courts for both their public and private conduct and throughout the duration of their time in office.[86] The following sections will explore the scopes of personal immunity in further detail.

1.2.1.1 Subjective Scope

Immunity *ratione personae* is a blanket immunity. It provides near-absolute protections to its beneficiaries, but its subjective scope is narrowly confined to a short list of top-tier public offices within the state apparatus and who perform functions not only at the domestic level but also in international relations.[87] As a recognized customary principle of international law, personal immunity has consistently been upheld for three government offices: the head of state, head of government, and minister for foreign affairs.[88] Often collectively called either the *troika* or the "threesome,"[89] these positions are the chief public representatives of sovereign states in international relations. In some countries, such as in the United Kingdom (UK), the head of state and head of government are separate offices: The monarch acts as the head of state, while the prime minister acts as the head of government. In other countries, such as the United States, a single government position of the president encompasses both mandates. Additionally, certain religious leaders may be considered heads of state from the point of view of immunity *ratione personae*, such as the Pope – head of the Vatican City State.[90]

The ILC Special Rapporteur Escobar Hernández noted the *troika* is automatically considered to perform the representational function by virtue of international law.[91] This interpretation has been enshrined within a draft

[86] Foakes, *The Position of Heads of State and Senior Officials in International Law*, 7.
[87] ILC, *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Special Rapporteur Concepción Escobar Hernández*, Document No. A/CN.4/673 (International Law Commission, 2014), para. 27.
[88] ILC, *Second Report by Special Rapporteur Escobar Hernández*, para. 60.
[89] ILC, *Preliminary Report on the Immunity of State Officials from Foreign Criminal Jurisdiction by Special Rapporteur Concepción Escobar Hernández*, Document No. A/CN.4/654 (International Law Commission, 2012), para. 15.
[90] Fox and Webb, *The Law of State Immunity*, 540.
[91] ILC, *Second Report by Special Rapporteur Escobar Hernández*, para. 59.

article by the ILC, which broadly states "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction."[92] When the ICJ had the opportunity to broaden the list of those covered by personal immunity under customary international law, namely in *Certain Questions of Mutual Assistance in Criminal Matters*, it declined to do so.[93] Despite the authoritative decisions of the ICJ on the matter, there continues to be a debate in relation to the expansion of immunity *ratione personae* to a broader roster of government officials, for example, "a head of state's consultant or a chief of police on a special mission, or even representatives of a rebel organization."[94] This would be particularly relevant for those states in which the office of the minister for foreign affairs is not the sole international representative of a state abroad and where other members of the government (co-)represent the state in foreign relations.

Other than the *troika*, international treaty law extends immunity *ratione personae* to incumbent senior diplomats and officials of the United Nations and other international organizations. The contours of these immunities are further discussed in Sections 1.3.1 and 1.3.3.

1.2.1.2 Material Scope

As the highest level of protection afforded to individuals entrusted with prominent public functions, personal immunity covers official and private acts. According to the ILC's draft article 4(2), the immunity enjoyed by the *troika* – which is closely similar to that granted to the heads of diplomatic missions – "covers all acts, whether private or official, that are performed by such persons prior to or during their term in office."[95] An official act is defined

[92] ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction, Text of Draft Articles 1, 3, and 4 Provisionally Adopted by the Drafting Committee at the Sixty-Fifth Session*, Document No. A/CN.4/L.814 (International Law Commission, 2013), Text of Draft Articles 1, 3, and 4 Provisionally Adopted by the ILC.

[93] International Court of Justice, Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v. France*), Judgment, ICJ Rep. 2008, 177 (reiterating the position of the head of state, head of government, and minister of foreign affairs as beneficiaries of immunities ratione personae and rejecting such protection to procureur de la République and the Head of National Security).

[94] Anthony Chang, Sadaf Kashfi, and Shirin Kiamanesh, "Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply?" International Justice and Human Rights Clinic (Vancouver, Canada: Peter A. Allard School of Law (The University of British Columbia), December 2016).

[95] ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction, Text of Draft Articles 1, 3, and 4 Provisionally Adopted by the Drafting Committee at the Sixty-Fifth Session*.

as "any act performed by a State official in the exercise of State authority,"[96] while a private act constitutes any act deemed to be nonofficial. The acts covered by personal immunity could potentially include *ultra vires* acts – those beyond a person or entity's legal power or authority – as well as illegal acts while the official is in office.

International jurisprudence thus often refers to immunity *ratione personae* as "full," "total," "integral," or "absolute"[97] because of the complete protection it confers upon specific officeholders with respect to any act they perform and regardless of the nature of the act and the place where it occurred:

> The "fullness" of immunity *ratione personae* means that it is enjoyed in respect of any act performed by a Head of State, Head of Government or Minister for Foreign Affairs, regardless of the nature of the act, the place where it was performed and the nature of the foreign travel (official or private) during which a specific State sought to exercise foreign criminal jurisdiction.[98]

Due to the broad material scope of immunity *ratione personae*, courts may determine it to be unnecessary to elaborate in detail on what constitutes "private acts" or "official acts," when such acts were committed, why they were committed, or when an attempt was made to exercise jurisdiction over them.[99]

1.2.1.3 Temporal Scope

As stipulated in the ILC's draft article 4(1), personal immunity is limited to a state official's term in office and automatically expires when that term ends.[100] This means that personal immunity begins when the person to whom it applies takes office and concludes when they leave office, making the protection from foreign jurisdiction a temporary matter. When public officials entitled to immunity *ratione personae* cease to hold office, they are left with functional immunity or immunity *ratione materiae* that protects them only for official acts.

[96] ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction, Text of the Draft Articles (2 and 6) Provisionally Adopted by the Drafting Committee at the Sixty-Seventh Session*, Document No. A/CN.4/L.865 (International Law Commission, 2015), Text of Draft Articles 2 and 6 Provisionally Adopted by the ILC.

[97] ILC, *Memorandum*, para. 137.

[98] ILC, *Second Report by Special Rapporteur Escobar Hernández*, para. 72.

[99] International Court of Justice, *Judgment in Arrest Warrant*, ICJ Rep. 2002, 3, para. 55.

[100] ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction, Text of Draft Articles 1, 3, and 4 Provisionally Adopted by the Drafting Committee at the Sixty-Fifth Session*.

1.2.2 *Functional Immunity (Immunity* Ratione Materiae*)*

Functional immunity or immunity *ratione materiae* is tied to the acts of public officials rather than their office or status. It is thus known as conduct-based immunity. It does not apply to personal acts, yet it continues to exist even when an official no longer works in an official capacity. Functional immunity derives from the immunity of the state. It is based on the doctrine of the imputability of the acts of the individual to the state. "Accordingly, any act performed by the individual as an act of the State enjoys the immunity which the State enjoys."[101] In *Blaškić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) clarified the rationale that upholds immunity *ratione materiae*:

> Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act.[102]

The purpose of functional immunity is further elaborated by Lord Millet in *Pinochet* (No. 3):

> [Functional immunity] operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual.
>
> The immunity is sometimes also justified by the need to prevent the serving head of state or diplomat from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office.[103]

The remainder of the present section will discuss the scope of functional immunity concerning the persons, acts, and time frame for which its protections apply, which is done following the same structure as in Section 1.2.1.

[101] Fox and Webb, *The Law of State Immunity*, 364.
[102] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14 (1997), para. 38.
[103] House of Lords, *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)*, Judgment, [1999] UKHL 17, reproduced in 38(3) ILM 581 (1999), 644–45.

1.2.2.1 Subjective Scope

The range of persons who enjoy immunity from jurisdiction *ratione materiae* is much broader and more diverse than that of immunity *ratione personae*. As noted by Lord Browne-Wilkinson in *Pinochet* (No. 3), "[i]mmunity [*ratione materiae*] applies . . . to all state officials who have been involved in carrying out the functions of the state."[104] Immunity *ratione materiae* could apply even to mid- and low-level ranks (e.g., customs agents, members of the armed forces, police officers, etc.), but the practice shows the beneficiaries of functional immunity have mostly been officials in the high or middle ranks of government.[105] Some scholars have argued that because immunity *ratione materiae* attaches to conduct rather than office, it can also be accorded to individuals or entities who are not state officials but who act on behalf of the state.[106]

1.2.2.2 Material Scope

According to the ILC's draft article 6(1), functional immunity is available "only with respect to acts performed in an official capacity."[107] Hence, this type of immunity does not extend to "acts performed in a private capacity," which is a notable and contrasting feature of comparison between immunity *ratione personae* and immunity *ratione materiae*. The usage of the concept "acts performed in an official capacity" has been borrowed by the ILC from the ICJ judgment in the *Arrest Warrant* case.[108] Since then, the commission has continued to use "acts performed in an official capacity" to refer to acts covered, in principle, by immunity *ratione materiae*. This term has been used interchangeably with synonymous concepts, such as "official act" and "public act."[109]

The distinction between "acts performed in an official capacity" and "acts performed in a private capacity," or, put simply, the difference between official and private acts, however, is far from obvious and clear-cut.[110] For example, *ultra vires* and criminal conduct of state officials acting on behalf of

[104] Ibid., 594.
[105] ILC, *Third Report by Special Rapporteur Escobar Hernández*, para. 37.
[106] Foakes, *The Position of Heads of State and Senior Officials in International Law*, 7.
[107] ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction, Text of the Draft Articles (2 and 6) Provisionally Adopted by the Drafting Committee at the Sixty-Seventh Session*.
[108] International Court of Justice, *Judgment in Arrest Warrant*, ICJ Rep. 2002, 3, para. 55.
[109] ILC, *Report on the Work of the Sixty-Fifth Session* (Chapter V "*Immunity of State Officials from Foreign Criminal Jurisdiction*"), Document No. A/68/10, paras. 40–49 (International Law Commission, 2013), para. 28.
[110] ILC, *Fifth Report by Special Rapporteur Escobar Hernández*, para. 32.

the state and utilizing the instruments and resources of the state available to them by virtue of their official position raises concerns regarding whether such acts are protected by immunity *ratione materiae*. On the one hand, the law of state responsibility embodied in article 7 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) dictates:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[111]

Put simply, *ultra vires* acts remain attributable to the state for purposes of responsibility. Accordingly, acts that are outside of the state's defined sphere of competence, including those acts that are unlawful or criminal under local law, may nonetheless be attributed to the state and thus be protected with immunity *ratione materiae*. From this perspective, the very purpose of the immunity doctrine would lose much of its original meaning and purpose if unlawful and criminal acts were automatically removed from its material scope. For instance, Lord Hoffman in *Jones* supported this position, suggesting that "if the act is done under colour of official authority, the purpose of personal gratification ... should be irrelevant."[112] In other words, "the conduct does not have to be lawful to attract immunity."[113] A Lord of Hope of Craighead emphasized in the *Pinochet* litigation (No. 3):

> It may be said that it is not one of the functions of a head of state to commit acts which are criminal according to the laws and constitution of his own state or which customary international law regards as criminal. But I consider that this approach to the question is unsound in principle. The principle of immunity *ratione materiae* protects all acts which the head of state has performed in the exercise of the functions of government.[114]

On the other hand, it is open to question whether acts committed by state officials for the satisfaction of purely private causes and motives may be considered as acts carried out in an official capacity. With this logic, the contrasting position to the one discussed earlier dictates that a state official

[111] United Nations General Assembly, Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), with Commentaries, Resolution 56/83 UN Doc. A/RES/56/83 (2001).
[112] House of Lords, *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia and Others*, [2006] UKHL 26, para. 92.
[113] House of Lords, *Pinochet No. 3*, [1999] UKHL 17, reproduced in 38(3) ILM 581 (1999), 622.
[114] Ibid., 622.

committing unlawful or criminal acts in the course of their official functions is not shielded from foreign jurisdiction by immunity *ratione materiae*. This reasoning is informed by ILC's commentary in ARSIWA:

> Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instruction, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.[115]

According to Henri Decoeur, this logic applies to situations when the ability of state officials to commit crimes is greatly increased by the possibility of taking advantage of the official position, such as "where diplomats use diplomatic pouches to smuggle drugs, their conduct is rendered possible by the prerogative they enjoy by virtue of their official position. Without it, they would not be able to bypass customs inspection."[116]

All in all, the line between official and private conduct is not easy to draw, making the material scope of immunity *ratione materiae* contingent on the facts of each particular case.

1.2.2.3 Temporal Scope

Since functional immunity attaches to conduct and not office, it extends to both incumbent and former officials. While only covering official acts, functional immunity provides a wide temporal scope: An official no longer serving in the capacity that conferred functional immunity upon their acts is still covered by immunity in relation to official acts performed throughout the duration of their mandate.[117]

1.3 INTERNATIONAL IMMUNITY REGIMES

International law establishes distinct immunity regimes that are justified differently and provide different levels of protection from foreign jurisdiction to its holders. The present section discusses some of the most common treaty-based and customary jurisdictional immunity regimes under international law.

1.3.1 *Diplomatic and Consular Immunities*

The ICJ, in its judgment in the *Hostages* case, emphasized there is "no more fundamental prerequisite for the conduct of relations between States than the

[115] ARSIWA, commentary to art. 7, para. 7.
[116] Decoeur, *Confronting the Shadow State*, 50.
[117] ILC, *Second Report by Special Rapporteur Kolodkin*, 32–4.

inviolability of diplomatic envoys and embassies" for effective cooperation in the international community.[118] Although the scope of diplomatic immunity varies across diplomatic agents,[119] depending on their rank and functions, the top echelon of the diplomatic corps is generally afforded near-absolute immunity from criminal prosecution and civil lawsuits in their professional and, to a larger extent, private lives while in office.[120]

The doctrine of diplomatic immunity is one of the oldest facets of international relations. Foreign envoys used to be given a special status in the ancient Greek and Roman empires, even if the exact nature of protection afforded to foreign envoys varied widely throughout the ancient world. This doctrine has evolved over centuries, allowing for the rules of diplomatic immunity, along with those of comity and reciprocity, to turn into a system of legal norms.[121] As a matter of international law, diplomatic immunity evolved under the influence of custom and international practice until after the Second World War.[122] Today, international treaty law is the predominant legal source regarding the immunities of diplomatic agents.

Diplomatic immunity is codified in two international treaties – the Vienna Convention on Diplomatic Relations (henceforth VCDR or "Vienna Convention")[123] of 1961 and the Vienna Convention on Consular Relations (VCCR)[124] of 1964. These treaties have been widely accepted – having been ratified by 193 and 182 states parties, respectively – and

[118] International Court of Justice, United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), Judgment, ICJ Rep. 1980, 3, para. 91.

[119] "Diplomatic agent" is a generic term that applies to a wide pool of state officials with a mandate in international relations, ranging from officials of the first order, such as ambassadors, plenipotentiary, and permanent representatives, to officials of the second order, such as envoys, *chargés d'affaires*, and consuls of various ranks.

[120] For more information on the application of diplomatic immunity for different categories of diplomatic agents and staff in the United States, see Office of Foreign Missions, "Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities" (Washington, DC: United States Department of State, 2018), Annex C.

[121] Linda S. Frey and Marsha L. Frey, "Diplomatic Immunity," in *The SAGE Handbook of Diplomacy*, eds. Costas M. Constantinou, Pauline Kerr, and Paul Sharp (Thousand Oaks, CA: SAGE, 2016), 197–98.

[122] For more details on the role of the ILC in the codification process of diplomatic privileges and immunities, see Kai Bruns, "On the Road to Vienna: The Role of the International Law Commission in the Codification of Diplomatic Privileges and Immunities, 1949–1958," in *Diplomatic Law in a New Millennium*, ed. Paul Behrens (Oxford: Oxford University Press, 2017), 54–76.

[123] Vienna Convention on Diplomatic Relations, April 18, 1961 (entered into force on April 24, 1964), 500 UNTS 95.

[124] Vienna Convention on Consular Relations, April 24, 1963 (entered into force on March 19, 1967), 596 UNTS 261.

have served as the cornerstone of diplomatic and consular relations between states.

Acknowledging "foreign representatives may carry out their duties effectively only if they are accorded a certain degree of insulation from the application of the laws of the host country," the VCDR provides jurisdictional immunity from criminal prosecution and protection from most civil and administrative actions to all those entitled to it.[125] Accordingly, receiving states must dismiss a suit against any foreign public official who is protected with jurisdictional immunity under the convention. Diplomatic immunity from criminal proceedings in a foreign court is absolute, and an incumbent diplomatic agent cannot be prosecuted abroad for a criminal offense.[126]

However, a sitting diplomatic agent's civil immunity is not absolute. Diplomatic agents cannot be sued in civil courts unless they have a personal (nonofficial) involvement in certain commercial, real-estate, or inheritance-related concerns, or unless they have separate professional activity.[127] The interpretation of the exception to commercial activities remains in flux with the very definition of what constitutes "commercial activity" being contested. It should be stressed that in the context of article 31(1)(c) of the VCDR, the exception does not relate to a single act of commerce but to a continuous activity.[128] Ordinary contracts relating to daily life in the receiving state, such as the purchase of goods, medical, legal, or educational services, or rental agreements, do not constitute "commercial activities." Human rights defenders have raised concerns about the need to reinterpret the "commercial activity exception" to diplomatic immunity in light of illegal businesses that some diplomats have been alleged to run, such as trafficking in persons for domestic servitude.[129] Some scholars and activists have also made the case

[125] VCDR art. 31 ("A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction. . .").

[126] Sanderijn Duquet, "Immunities of Diplomatic and Consular Personnel – An Overview," in *The Cambridge Handbook of Immunities and International Law*, eds. Luca Ferro, Nicolas Angelet, and Tom Ruys (Cambridge: Cambridge University Press, 2019), 417.

[127] VCDR, art. 31(1)(a), (b), and (c).

[128] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Fourth Edition, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2016), 251, 387.

[129] For further details related to the commercial activity exception to diplomatic immunity as per art. 31(1)(c) of the VCDR in cases of exploitative labor practices in diplomatic households amounting to trafficking in persons, see Section 2.3.2.

that diplomatic immunity ceases to exist when a diplomat performs an illegal activity in pursuit of private pecuniary gain.[130]

Compared to diplomats, consular officers only enjoy functional immunity (immunity *ratione materiae*). The VCCR stipulates that consular agents are immune for "acts performed in the exercise of consular functions"[131] with respect to both criminal and civil matters. Article 5 of the VCCR provides a non-exhaustive list of the most important consular functions, all of which are of an administrative nature (e.g., issuing of travel documents, attending to the difficulties of its own nationals in the receiving state, and generally promoting the commercial interests of the sending state).[132]

The VCDR and the VCCR include two kinds of protections afforded to diplomatic agents: freedom of movement[133] and freedom of communication,[134] both of which are meant to facilitate the exercise of diplomacy and foreign relations. The freedom of movement implies that a diplomatic envoy may travel around the territory of the receiving state without having to ask permission from local authorities. The restrictions on freedom of movement are rare, and if they occur, they are often related to national security considerations. Cases in which certain geographical areas were barred from access by diplomatic envoys were recorded during the Cold War period. Governments of the Soviet Union republics and other states of the former Soviet Bloc used to restrict access to such premises as military bases and nuclear plants to members of foreign diplomatic missions.[135] With the end of the Cold War, restrictions on access to areas of strategic significance have gradually waned but did not cease to exist.[136]

[130] Duquet, "Immunities of Diplomatic and Consular Personnel," 418; Martina Vandenberg and Sarah Bessell, "Diplomatic Immunity and the Abuse of Domestic Workers: Criminal and Civil Remedies in the United States," *Duke Journal of Comparative & International Law* 26, no. 3 (August 2, 2016): 595–633; ACLU, "Petition No. P-1481-07: Domestic Workers Employed by Diplomats. Response to the United States of America" (American Civil Liberties Union, 2007), 1481-07, www.aclu.org/other/petition-un-domestic-workers-iachr. For more details on the commercial activity exception to diplomatic immunity, see Section 2.3.2, *infra*.

[131] VCCR, art. 43(1).

[132] VCCR, art. 5(a)–(m).

[133] VCDR, art. 26; VCCR, art. 34.

[134] VCDR, art. 27; VCCR, art. 35.

[135] Denza, *Diplomatic Law*, 173; Duquet, "Immunities of Diplomatic and Consular Personnel," 422.

[136] See, for example, Owen Churchill, "China 'Systematically' Denies Access to Tibet, US State Department Says," *South China Morning Post*, March 18, 2022, sec. News, www.scmp.com/news/china/diplomacy/article/3170935/china-systematically-denies-access-tibet-us-congress-report.

Freedom of communication is available to diplomatic agents during their functions in the receiving state. It implies free and confidential communication between a diplomatic agent and the sending state. Denza notes: "[i]f the confidentiality of the communications of the mission could not be relied on, they would have little advantage over press reporting."[137] Despite the obligation on the receiving state to secure freedom of communication to diplomatic missions and their representatives, there were recurring cases of listening devices implanted in mission buildings or on diplomats during the Cold War. The unauthorized interception of communications has also been recorded since the late 1990s with the expansion of electronic and cellular communications.[138]

Official diplomatic and consular bags (or pouches) are not permitted to be opened or detained,[139] but they need to have visible signs on the outside and can only contain "diplomatic documents or articles intended for official use."[140] There is no restriction in the VCDR on the size or weight of diplomatic bags. The diplomatic bag may be delivered by (a) the regular (professional) diplomatic courier, (b) the diplomatic courier ad hoc, and (c) the captain of a ship or commercial aircraft.[141] A courier entrusted with a diplomatic bag is protected by the receiving state in the performance of official duties and is entitled to immunity from arrest or detention. In addition to the courier option, a diplomatic bag may be sent out by a postal service or any other means of unaccompanied shipping.

Diplomatic and consular agents' personal baggage is also exempt from inspection, unless there are serious grounds to believe it contains articles not covered by the exemption, such as articles not associated with official functions and mandates. A customs investigation is allowed in cases in which the diplomatic agent is suspected of possessing articles, "the import or export of

[137] Denza, *Diplomatic Law*, 178.

[138] Eileen Denza, "Diplomatic and Consular Immunities – Trends and Challenges," in *The Cambridge Handbook of Immunities and International Law*, eds. Luca Ferro, Nicolas Angelet, and Tom Ruys (Cambridge: Cambridge University Press, 2019), 433–51; Also see "European Union Diplomatic Communications 'Targeted by Hackers,'" *BBC News*, December 19, 2018, sec. Europe, www.bbc.com/news/world-europe-46615580.

[139] VCDR, art. 27(3); VCCR 35(3).

[140] VCDR, art. 27(4).

[141] VCDR, art. 27(5–7). A courier delivering a diplomatic bag must be provided with an official document confirming their status and specify the number of packages constituting the diplomatic bag. This official document also acts as verification of the diplomatic bag's diplomatic character and thus inviolability. For most details, see ILC, *Second Report on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier by Special Rapporteur Alexander Yankov*, Document No. A/CN.4/347 (International Law Commission, 1981), para. 163.

which is prohibited by the law or controlled by the quarantine regulations of the receiving state."[142] The dominant interpretation of the VCDR on the matter of prohibited goods is that, bound by article 41, diplomatic agents are banned from importation of articles and substances in contravention of domestic laws in the receiving state. Members of diplomatic missions are required to respect the rules and regulations of the receiving state and may use the diplomatic bag to transport the goods, such as firearms, alcohol, or narcotics, that are not banned for possession or import/export under the local laws.[143] Denza notes an interesting example that occurred during the period of alcohol prohibition at the beginning of the twentieth century in which the US government argued even foreign diplomats were not entitled to import alcohol.[144]

The principle of personal inviolability that protects diplomatic agents is one of the oldest established rules in international law. The idea of personal inviolability as reflected in the VCDR involves both negative and positive duties.[145] The negative duty comprises abstention on behalf of the receiving state to exercise any constraint on incumbent foreign diplomats. This includes such inviolabilities as those that guarantee the protected person shall not be detained, arrested, or subjected to a strip search by the authorities of another state.[146] Consuls may be arrested or detained pending trial where a "grave crime"[147] has been committed and "pursuant to a decision of the competent judicial authority" (i.e., a warrant issued by an appropriate court).[148] The private residence of foreign diplomats and their families is protected by the VCDR and has exactly the same inviolability as the premises of the mission – namely, it cannot be entered and searched without the authorization of the respective sending state.[149]

The positive duty implies protection by the receiving state of diplomatic agents of a foreign state. The Tehran hostage crisis[150] and the assassination of

[142] VCDR, art. 36(2); For comparison see VCCR 50(3).
[143] VCDR, art. 41(1).
[144] Denza, *Diplomatic Law*, 2016, 313.
[145] Duquet, "Immunities of Diplomatic and Consular Personnel," 414–15; Also see J. Craig Barker, *The Protection of Diplomatic Personnel* (London; New York, NY: Routledge, 2006), 2.
[146] VCDR, art. 29.
[147] The term of "grave crime" is not defined in the VCCR. The Department of State construes "grave crime" to mean a felony. See District Court for the Eastern District of Pennsylvania, *United States v. Cole*, 717 F. Supp. 309 (ED Pa 1989), 323.
[148] VCCR, art. 41(1).
[149] VCDR, art. 30(1).
[150] United States Department of State, "The Iranian Hostage Crisis: Short History" (Washington, DC: Office of the Historian, n.d.), https://history.state.gov/departmenthistory/short-history/iraniancrises.

a Russian diplomat in an art gallery in Ankara, Turkey, in 2016,[151] are only two selected examples of the dangers of the diplomatic profession.[152] The positive duty related to the inviolability of diplomatic agents is the obligation of the receiving state to take "all appropriate steps to prevent any attack on his person, freedom or dignity."[153] In the same way, article 29 of the VCDR, having established the inviolability of the person of the diplomatic agent, further stipulates the receiving state "shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."[154]

Serving diplomats are accorded functional immunity (immunity *ratione materiae*) after their term in office comes to an end, and they leave the territory of the receiving state. It shields them only for official acts performed "in the exercise of his functions as a member of the mission."[155] This *residual immunity* has been described as "necessary"[156] and "directly imputable to the state or inextricably tied to a diplomat's professional activities."[157] Therefore, it does not cover the acts that are "incidental" to the exercise of diplomatic functions.[158]

It is also worthwhile mentioning that in cases where the members of a diplomatic mission are nationals of the state to which they are posted, most privileges linked to official status may not apply, unless the state officials

[151] Tim Arango and Rick Gladstone, "Russian Ambassador to Turkey Is Assassinated in Ankara," *The New York Times*, December 19, 2016, sec. World, www.nytimes.com/2016/12/19/world/europe/russia-ambassador-shot-ankara-turkey.html.

[152] For more information on the protection of diplomatic personnel, see Barker, *The Protection of Diplomatic Personnel*.

[153] VCDR, art. 22(2). Also see International Court of Justice, *Judgment in US Diplomatic and Consular Staff in Tehran*, ICJ Rep. 1980, 3, paras. 58, 67, and 92; International Court of Justice, *Judgment in Certain Questions of Mutual Assistance in Criminal Matters*, ICJ Rep. 2008, 177, para. 174.

[154] VCDR, art. 29; VCCR, art. 40.

[155] VCDR, art. 39(2) ("When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so . . .").

[156] District Court for the Southern District of New York, *Baoanan v. Baja*, 627 F. Supp. 2d 155 (SDNY 2009), 162.

[157] Court of Appeals, *Swarna v. Al-Awadi*, 622 F.3d 123 (2nd Cir. 2010), 135.

[158] Ibid. (holding that a former Kuwaiti diplomat's employment of a domestic servant while serving in the Kuwaiti Mission was a private act rather than an official diplomatic act, and thus the former diplomat was not entitled to residual diplomatic immunity under the VCDR from the servant's claims against him), 142. Also see Court of Appeals, *Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002) (holding that the Deputy Consul General for the Korean Consulate in the United States was not entitled to consular immunity because hiring and supervision of a personal domestic servant was outside of the exercise of consular functions), 1146.

receive an express consent of the receiving state. The VCDR and VCCR are explicit in that diplomatic and consular agents are to be appointed from among persons of the sending state's nationality.[159] In situations where diplomatic or consular agents are nationals of the receiving state, they will be protected only for official acts.[160]

1.3.2 *Head-of-State Immunity*

Head-of-state immunity originates from sovereign immunity and dates to a time when the state and its sovereign ruler were inseparable.[161] Consequently, head-of-state immunity "is premised on the concept that a state and its ruler are one for purposes of immunity."[162] In centuries past, the exercise of jurisdiction over a foreign state and/or its sovereign(s) was considered "contrary to their dignity and as such inconsistent with international courtesy and the amity of international relations," thus it was understood that visiting rulers (later expanded to include heads of government and foreign ministers) were untouchable.[163] Although heads of state are no longer equated with the state they represent, head-of-state immunity and sovereign (state) immunity maintain a common tradition and pursue similar goals.[164]

Unlike diplomatic immunity, however, the head-of-state immunity has never been codified. It operates as a matter of customary international law,[165] evolving as occasions arise for state practice to be examined or revised following the decisions of courts. Under customary international law, incumbent heads of state, heads of government, and ministers for foreign affairs are granted full immunity and inviolability (immunity *ratione personae*). This includes freedom from criminal and civil jurisdictions for both official and

[159] VCDR, art. 8; VCCR, art. 22.
[160] VCDR, art. 38(1); VCCR, art. 71(1).
[161] Jerrold L. Mallory, "Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings," *Columbia Law Review* 86, no. 1 (1986): 170.
[162] District Court for the Eastern District of New York, *Lafontant v. Aristide*, 844 F. Supp. 128, 132.
[163] Barker, "Shared Foundations and Conceptual Differentiation in Immunities from Jurisdiction," 185–204; Foakes, *The Position of Heads of State and Senior Officials in International Law*, 11; ILC, *Memorandum*, para. 28.
[164] Varughese George, "Head-of-State Immunity in the United States Courts: Still Confused after All These Years," 1051, 1056.
[165] The Convention on Special Missions of 1969 is an exception, and its art. 21 stipulates that heads of state are entitled to "privileges and immunities accorded by international law to Heads of State on an official visit." Neither the article nor the convention provides further detail. See Convention on Special Missions, December 8, 1969 (entered into force on June 21, 1985), 1400 UNTS 231.

private acts, along with freedom from arrest, search, and other measures of constraint (e.g., appearing or giving evidence as a witness).[166]

While diplomatic immunity and the immunity of the *troika* are quite similar from a theoretical perspective, the practical differences between the two are substantial, with the latter providing considerably more protection to its beneficiaries.[167] For instance, while the immunity of diplomatic agents is limited to the territory of the receiving state to which they are posted, the *troika* is protected beyond the receiving state's geographical bounds.[168] Given that they represent their state in international affairs on a permanent basis, their immunity, along with inviolabilities and freedoms, apply in any foreign state. Customary international law opposes the idea that the *troika* may be subject to prosecutions before the courts in a foreign state, in the absence of a waiver of immunity by the sending state concerned. The ICJ judgment in *Arrest Warrant* firmly established that heads of state, heads of government, and ministers for foreign affairs enjoy jurisdictional immunities in foreign courts both in civil and criminal proceedings, with the exception of when the foreign jurisdiction does not recognize an individual as the head of state or, alternatively, does not recognize the state they represent.[169]

The Institute of International Law (IIL) adopted a resolution in 2001 in Vancouver, entitled "Immunities from Jurisdiction and Execution of Heads of State and Government in International Law," which states the head of state "may not be placed under any form or arrest or detention" and that states must make "all reasonable steps ... [to] prevent any infringement of his or her person, liberty, or dignity."[170] This approach reflects the long-accepted practice that a state hosting a legitimate foreign leader is under customary obligation to protect him or her from physical attack and to take all appropriate steps to punish anybody who attempts such an attack.[171] Joanne Foakes explains this "obligation to protect extends, not only to the safety of a head of State's person but also to the premises in which he or she resides while in the receiving State's territory, personal baggage, and other property accompanying

[166] International Court of Justice, *Judgment in Arrest Warrant*, ICJ Rep. 2002, 3, para. 55.
[167] Barker, *The Protection of Diplomatic Personnel*, 25.
[168] Salvatore Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation," *European Journal of International Law* 12, no. 3 (June 1, 2001): 600.
[169] International Court of Justice, *Judgment in Arrest Warrant*, ICJ Rep. 2002, 3, para. 51.
[170] Institute of International Law [Institut de Droit International], *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Thirteenth Commission, Rapporteur Joe Verhoeven (Vancouver, Canada, 2001), art. 1.
[171] Foakes, *The Position of Heads of State and Senior Officials in International Law*, 74.

the head of State and any means of transport used by the head of State in entering, leaving, and traveling within the territory of the receiving State."[172] This position closely intertwines with the personal inviolability of serving heads of state, a key element of which is "the receiving State's obligation to refrain from exercising sovereign powers and, in particular, those relating to the enforcement of its laws in any way which might infringe that inviolability," such as the arrest or physical detention of a foreign head of state without their consent.[173]

The *troika* also enjoys freedom of movement and freedom of communication. Immunity *ratione personae* is in full force in foreign jurisdictions during official visits and private trips of incumbent heads of state, even if they are traveling *incognito*.[174] That said, heads of state have no right of entry into a foreign state without that destination state's approval. The visited state can refuse entrance to a foreign head of state, especially in cases where the foreign leader in question is politically undesirable or unwelcome. Individual state actions may be supplemented or preceded by collective measures of international organizations requiring their constituent member states take the necessary steps to prevent certain individuals, including foreign heads of state and other high-ranking members of government, from entering or transiting through their territories (e.g., targeted sanctions).[175] By virtue of international law, however, states that host international organizations are prohibited from barring the travel of foreign heads of state for the purpose of visiting said international organizations.[176] For example, according to the Agreement of the Headquarters of the United Nations, signed between the United Nations and the United States in 1947 (henceforth "UN Headquarters Agreement"),[177] the latter is obligated to remove "any impediments to transit to or from the headquarters district" for the representatives of member

[172] Ibid.

[173] Ibid., 76.

[174] Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?" 599.

[175] A good example of such collective measures against foreign heads of state is the 2012 European Union (EU) travel ban against President Bashar Assad of Syria and members of the Assad family. For details, see Ian Traynor and Ian Black, "Assad's Relatives Face Asset Freeze and Travel Ban as EU Steps up Sanctions," *The Guardian*, March 23, 2012, www.theguardian.com/world/2012/mar/23/assads-eu-sanctions-asma-bashar-syria.

[176] Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?" 600.

[177] Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1947 (entered into force on October 31, 1947) 11 UNTS 11.

governments accredited to the United Nations along with the families of such representatives,[178] irrespective of the relations existing between the United States and the foreign government in question or absence thereof.[179] State practice on this matter is not without its controversies. For instance, in 2013, the US government found itself at an impasse related to the Sudanese president's application for entry to the United States to attend a meeting at the UN Headquarters in New York City. Sudan's President Omar Hassan Ahmad Al Bashir (henceforth Omar Al Bashir or Al Bashir) has been the subject of two arrest warrants by the ICC since 2009 on allegations of genocide and of crimes against humanity and war crimes committed in Darfur.[180] Although the United States is not a party to the ICC, the potential reputational risk to the US government, if it were to issue a visa to Al Bashir, could be detrimental to the country's long-term commitment to ending impunity against foreign leaders complicit in crimes under international law. In this case, the United States did not issue the entry visa to Al Bashir, bypassing the obligations under the UN Headquarters Agreement, for reasons of his ineligibility to receive a US visa in connection with the ICC arrest warrant and because of Sudan's placement on the US State Sponsors of Terrorism List.[181]

1.3.3 *Immunity of State Representatives to International Organizations and of International Civil Servants*

There is a separate legal regime that governs the immunity of members of missions representing states in international organizations or in international conferences and the immunity of personnel of international organizations (i.e., international civil servants). Due to the somewhat recent nature of this legal regime, there does not appear to exist a customary norm guiding the scope of the privileges and immunities of this category of officials.[182] Additionally, because of the challenge of standardizing practices owing to

[178] Ibid., section 11.

[179] Ibid., section 12.

[180] International Criminal Court, Pre-Trial Chamber I, *Prosecutor v. Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (2009); International Criminal Court, Pre-Trial Chamber I, *Prosecutor v. Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (2010).

[181] US Embassy in Khartoum, "U.S. Embassy Khartoum Reiterates That the United States Has Made Its Position with Respect to Sudanese President Omar al-Bashir's Travel Clear," Press Release (Khartoum, May 17, 2017).

[182] Christian Walter and Fabian Preger, "Immunities of Civil Servants of International Organisations," in *The Cambridge Handbook of Immunities and International Law*, eds. Luca Ferro, Nicolas Angelet, and Tom Ruys (Cambridge: Cambridge University Press, 2019), 542.

the multiplicity of legal instruments of international organizations, the law applicable to the privileges and immunities of international organizations evolved mainly through international treaties.[183]

In contrast to the immunity regimes of diplomatic agents and of heads of state reviewed earlier, the immunity regime of state representatives to international organizations and of officials of international organizations is not based on the principles, rules, and norms of sovereign statehood. Whereas sovereign (state) immunity and the immunity of state officials is based on the principle of the sovereign equality of states, the immunity of international organizations lacking such sovereignty is the outcome of constituent treaties or headquarters agreements establishing them.[184] One of the common features of such agreements is the restriction placed on member states that precludes them from interfering in the matters of administration, management, and operation of international organizations, along with the activities of their staff, through their national courts or other institutions (e.g., law enforcement). It is generally considered individual governments are not allowed to compel an international organization to act in a specific way by making demands or requiring certain actions from the organization or any of its officials. With this reasoning, a national court may not be an inappropriate venue for individual claims against international organizations and their employees.[185] The jurisdictional immunity of international organizations is essential for the effective fulfillment of organizations' missions and mandates. An international organization's impartiality must be preserved against the possibility of conflicting interests and direct influence of its member states, particularly the host state in which the organization is seated.

Although there is no international treaty that codifies the immunities of international organizations, some relevant provisions are incorporated in the

[183] There exists a debate, particularly among scholars, as to whether international organizations enjoy immunity under customary international law. For more details, see, for example, Michael Wood, "Do International Organizations Enjoy Immunity Under Customary International Law?" *International Organizations Law Review* 10, no. 2 (June 20, 2014): 287–318; Niels Blokker, "International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?" *International Organizations Law Review* 14, no. 1 (June 29, 2017): 1–12; Kristina Daugirdas, "How and Why International Law Binds International Organizations," *Harvard International Law Journal* 57, no. 2 (2016): 325–81; Walter and Preger, "Immunities of Civil Servants of International Organisations," 544.

[184] See, for example, OAS, "Practical Application Guide on the Jurisdictional Immunities of International Organizations," Document No. CJI/Doc.554/18 Rev.2 (Rio de Janeiro, Brazil: Organization of American States, 2018).

[185] Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights*, 133.

UN Charter, which, since 1945, has served as "a model for similar provisions in the legal instruments of a wide variety of international organizations."[186] The charter provides that "[t]he organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes" and that "[r]epresentatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of the functions in connection with the Organization."[187] These provisions have laid the foundations for international treaties, with the most notable among them being the Convention on the Privileges and Immunities of the United Nations of 1946 (CPIUN),[188] and the Convention on the Privileges and Immunities of the Specialized Agencies of 1947 (CPISA).[189]

The majority of the staffs of international organizations only enjoy immunity for their official acts (immunity *ratione materiae*). Their private acts are not covered.[190] The highest sitting officials of the United Nations, however, enjoy "diplomatic immunity" in the sense that they are protected for both official and private acts (immunity *ratione personae*). For instance, CPIUN establishes personal immunity for the positions of the UN Secretary-General and all Assistant Secretaries-General, and all ranks in between (e.g., Deputy Secretary-General).[191] Most UN personnel are eligible to receive a UN *laissez-passer* – an official travel document of the United Nations.[192] It functions similarly to a diplomatic passport but only in connection with travel on official business.

CPISA accords personal immunity (immunity *ratione personae*) to UN agencies' executives or any officials acting on their behalf.[193] In addition to top-tier UN officers, CPIUN and CPISA grant immunity *ratione personae* to representatives of members to the principal and subsidiary organs of the

[186] Pieter H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, vol. 17, Legal Aspects of International Organizations (Leiden, Netherlands: Brill Nijhoff, 1994), 127.

[187] UN Charter, art. 105(1) and (2).

[188] United Nations Convention on the Privileges and Immunities of the United Nations, February 13, 1946 (entered into force on September 17, 1946) 1 UNTS 15.

[189] United Nations Convention on the Privileges and Immunities of the Specialized Agencies, November 21, 1947 (entered into force on December 2, 1948) 33 UNTS 261.

[190] See CPIUN, section 18; CPISA, section 19.

[191] CPIUN, section 19, art. V ("In addition to the immunities and privileges specified in Section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law").

[192] Ibid., art. VII.

[193] CPISA, section 21, art. VI.

United Nations and to international conferences convened by the United Nations.[194] The treaties stipulate that both UN officials and representatives of members enjoy immunities under international law, which serve the interests of the organizations that employ them. They are not bestowed "for the personal benefit of individuals themselves."[195]

With regard to other international organizations, the instruments that establish them commonly create their legal personality and guarantee privileges and immunities to the organizations themselves and to their staffs, such as in the case of a few regional organizations (e.g., Agreement on Privileges and Immunities of the Organization of American States of 1949).[196] For example, the Parliamentary Assembly of the Council of Europe (PACE) – otherwise referred to as the Consultative Assembly – establishes its own immunity regime. It protects the Assembly's secretariat and the national representatives of states to PACE pursuant to the Statute of the Council of Europe[197] and the General Agreement on Privileges and Immunities of the Council of Europe.[198]

The highest offices in the Council of Europe – Secretary-General and Deputy Secretary-General – enjoy, in respect of themselves, their spouses, and minor children the privileges and immunities accorded to diplomatic envoys in accordance with international law.[199] With regard to the parliamentary immunity provided for in article 14 of the General Agreement, the representatives to PACE and their substitutes enjoy legal protection from any judicial proceedings (criminal, civil, or administrative) for an opinion expressed or a vote cast in the exercise of functions. This immunity falls under the category of personal immunity and is commonly referred to as non-liability or the "parliamentary privilege."[200] The General Agreement, however, expands the legal protection to also include personal inviolability (i.e., arrest and detention) during the sessions of the Consultative Assembly, and when

[194] CPIUN, section 11, art. IV; CPISA, section 13, art. V.
[195] CPIUN, section 14, art. IV (representatives of members); section 20, art. V (officials); CPISA, section 16, art. V (representatives of members); section 22, art. VI (officials).
[196] Agreement on Privileges and Immunities of the Organization of American States, May 15, 1949 (entered into force on June 4, 1951) 1438 UNTS 79.
[197] Statute of the Council of Europe, May 5, 1949 (entered into force on August 3, 1949) 87 UNTS 103, art. 40.
[198] General Agreement on Privileges and Immunities of the Council of Europe, September 2, 1949 (entered into force on September 10, 1952), 250 UNTS 12, arts. 13–15.
[199] Ibid., art. 16.
[200] UNODC, "Technical Guide to the United Nations Convention against Corruption" (Vienna, Austria: United Nations Office on Drugs and Crime, 2009), 85.

traveling to and from the place of meeting.[201] Pursuant to article 15, the representatives to PACE and their substitutes, whether they are members of national parliaments in their home states or not, enjoy: "(a) on their national territory, the immunities accorded in those countries to members of Parliament; (b) on the territory of all other member States, exemption from arrest and prosecution."

In contrast to non-liability, the rules relating to the PACE parliamentary immunity and inviolability are of a temporal nature. The idea is that justice should be merely delayed, not denied, and that legal proceedings may be instituted once the period of immunity is concluded. The immunity regime of the Council of Europe includes the *flagrante delicto* exception, which facilitates justice and accountability in cases of blatant misuse of immunity. Therefore, the Council of Europe immunity afforded to the representatives and their substitutes does not apply when they are found "committing, attempting to commit, or just having committed an offence" or when immunity is waived by the Assembly at the request of a competent authority.[202] The 2021 Guidelines on the Scope of Parliamentary Immunities further specifies the Council of Europe immunities do not cover an inquiry into bribery-related offenses (for example, offering or requesting undue advantages in return for certain voting behavior), given that those offenses do not pertain to opinions expressed and/or votes cast.[203] A set of criteria related to the immunity regime was requested by the Independent Investigation Body on the Allegations of Corruption (IBAC), which led to an investigation into corruption-related allegations against members and former members of the Assembly in 2017–2018.[204] The IBAC recommended privileges and immunity not be invoked in cases of genuinely suspected corruption.[205] This is consistent with the best practices compiled by the UNODC to be applied

[201] This feature comes from the common-law tradition where there is a long-term practice of protecting parliamentarians against arrest and detention on their way to and from parliament or while attending parliament. The idea is that nobody should be able to stop parliament from meeting by detaining the members.

[202] General Agreement on Privileges and Immunities of the Council of Europe, art. 15. For more details on the procedure for the waiver of immunity of a representative or substitute, see Council of Europe, Rules of Procedure of the Assembly, Resolution 1202 (1999) adopted on November 4, 1999, with subsequent modifications (2022), rule 73.

[203] PACE, *Guidelines on the Scope of the Parliamentary Immunities Enjoyed by Members of the Parliamentary Assembly*, Document No. 15364 (Strasbourg, France: Council of Europe, 2021).

[204] "Corruption Inquiry at Council of Europe over Azerbaijan," *BBC News*, May 30, 2017, www.bbc.com/news/world-europe-40092451.

[205] PACE, *Guidelines on the Scope of the Parliamentary Immunities Enjoyed by PACE Members*, B-12 (Explanatory Memorandum by Rapporteur Tiny Kox).

toward the implementation of the UNCAC, wherein states parties to the convention are recommended to:

> . . . follow those States which grant a limited immunity which does not cover corrupt or otherwise criminal behaviour whether conducted in a private or official capacity. Thus, States Parties may consider applying an immunity rule or a jurisdictional privilege by evaluating whether the granting of immunity or a jurisdictional privilege is essential to assure the execution of the public office or function in question.[206]

The Central American Parliament (PARLACEN/*Parlamento Centroamericano*) has a similar system of parliamentary immunity to that of PACE. PARLACEN was created in 1991 and consists of elected representatives from the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.[207] The deputies are directly elected every five years by the people of the member countries; each country has the right to elect twenty representatives.[208] Presidents and vice presidents of states parties automatically become members of PARLACEN once their mandates end.[209] The Constituent Treaty of PARLACEN provides: (a) the same immunities and privileges as those accorded to the deputies of the congresses or national assemblies in the state in which they were elected; and (b) immunity *ratione personae* in the other states parties is akin to the immunities and privileges established by the VCDR.[210] They also enjoy the non-liability for their opinions expressed and votes cast as PARLACEN deputies.[211] This position was confirmed in the decision in *Portillo*.[212] In this case, Guatemala's ex-president Alfonso Portillo filed a lawsuit against Guatemala in the Central American Court of Justice (CCJ/*Corte Centroamericana de Justicia*), where he argued PARLACEN immunity protected him from prosecution in his country on embezzlement charges. The former president contended the pursuit of criminal charges against him was a violation of Guatemala's international responsibility to uphold the tenets of the Central American Parliament's founding treaties. Following the rationale of the decision in ICJ's *Arrest Warrant* case, the CCJ ruled Guatemala's failure to request a waiver of

[206] UNODC, "Technical Guide to the United Nations Convention against Corruption," 86.
[207] Treaty Establishing the Central American Parliament (The Constitutive Treaty of PARLACEN), October 2, 1987 (entered into force on May 1, 1990) F-85(5).
[208] Ibid., art. 2.
[209] District Court for the Southern District of Florida, *In the Matter of the Extradition of Ricardo Alberto Martinelli Berrocal*, 17-22197-civ-TORRES, Docket No. 70 (SD Fla 2017), 64–5.
[210] Constitutive Treaty of PARLACEN, art. 22(a)(b).
[211] Ibid., art. 22(d).
[212] Central American Court of Justice, *Portillo Cabrera v. Guatemala*, Judgment, Case No. 75, Proceedings No. 2-11-8-2006 (2008).

Portillo's PARLACEN immunity prior to issuing an arrest warrant and initiating legal proceedings against him violated Guatemala's obligations under international law. The Guatemalan Constitutional Court disagreed with the CCJ,[213] finding no constitutional grounds for Portillo's PARLACEN immunity. This decision paved the way for Portillo's subsequent extradition first from Mexico to Guatemala in October 2008 and then to the United States,[214] where he pleaded guilty to a money laundering conspiracy.[215]

In the event of *flagrante delicto*, PARLACEN is authorized to proceed *ex officio* with lifting of immunities and privileges.[216] This was the case in 2003 when in an extraordinary session, the Plenary Assembly of PARLACEN suspended the immunity of its deputy for Honduras, César Augusto Díaz Flores, who was caught red-handed (and later convicted) by Nicaraguan authorities on the border with Costa Rica trafficking heroin.[217] This case, along with others, prompted calls for reform. Specific suggestions have been made to only grant PARLACEN immunity to popularly elected representatives, excluding former presidents admitted to PARLACEN automatically based on prior public service.[218]

1.4 EXTERNAL ACCOUNTABILITY AND IMMUNITY

1.4.1 *Waiver Regimes*

1.4.1.1. Express Waiver

While it may appear that high-ranking public officials covered by foreign official immunity are untouchable and above the law, there are ways to hold them to account. After all, immunity is first and foremost a procedural bar to

[213] La Hora, "Parlacen's Immunity is Unconstitutional [La inmunidad del Parlacen es inconstitucional]," October 25, 2019, https://lahora.gt/la-inmunidad-del-parlacen-es-inconstitucional/.

[214] United States Department of Justice, "Manhattan U.S. Attorney Announces Extradition of Former President of Guatemala, Alfonso Portillo, on Money Laundering Charge," Press Release (New York, NY: US Attorney's Office, Southern District of New York, May 13, 2015), www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-extradition-former-president-guatemala-alfonso-portillo.

[215] District Court for the Southern District of New York, *United States v. Portillo*, Judgment, 09-cr-01142, Docket No. 89 (SDNY 2014).

[216] Ibid., art. 22.

[217] Central American Parliament, Resolution No. APE/1-01-2003; Also see Randy Pestana, "The Cost of Failed Leadership: Corruption and Conflict in Honduras," in *Fragile States in the Americas*, eds. Jonathan D. Rosen and Hanna S. Kassab (Lanham, MD: Lexington Books, 2016), 64.

[218] Marco Julio Ochoa, "Parlacen, a Den of Corruption?" *UPI*, February 12, 2004, www.upi.com/Defense-News/2004/02/12/Analysis-Parlacen-a-den-of-corruption/75531076595162/.

foreign jurisdiction and, should it be waived by the appropriate authorities of the sending state, the courts of the receiving state will be enabled to assert jurisdiction.[219]

A shared feature across various types of foreign official immunity regimes is the right of the sending state or international organization whose official is implicated in a foreign court proceeding to waive immunity.[220] For instance, article 32(1) of the VCDR clearly dictates diplomatic immunity can be waived by the sending state. If the sending state refuses or fails within a reasonable period to lift the immunity of a diplomatic agent in question, the receiving state may declare them *persona non grata*, declining to recognize the person concerned as a member of the mission.[221] This may be done at any time, and there is no obligation to explain such a decision.[222] This provision was reproduced, nearly unchanged, in the VCCR[223] and other conventions.[224]

Although the declaration of *persona non grata* is the last resort that forces the expelled diplomat to leave the sending state within a few days,[225] it does not need any explanation on the part of the state making it. The *persona non grata* rule is part of the "self-containment" doctrine[226] codified by the VCDR. It can be used as a remedy against possible misconduct by members of missions.[227]

Likewise, in the context of the immunity of civil servants of international organizations, immunity is the prerogative of the organization and thus only

[219] International Court of Justice, *Judgment in Arrest Warrant*, ICJ Rep. 2002, 3 ("[I]mmunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity"), para. 60. Also see Foakes, *The Position of Heads of State and Senior Officials in International Law* ("Immunity operates as a procedural bar, not a substantive incapacity"), 97.

[220] ILC, *Seventh Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Special Rapporteur Concepción Escobar Hernández*, Document No. A/CN.4/729 (International Law Commission, 2019), para. 70. Also see District Court for the Southern District of New York, *United States v. Arizti*, 229 F. Supp. 53 (SDNY 1964) ("Even if the defendant could successfully challenge his government's denial that he was engaged in a diplomatic function, the immunity is that of his government and is not personal to him"), 55.

[221] VCDR, art. 9(1)(2).

[222] Ibid., art. 9(1).

[223] VCCR, art. 45.

[224] See, for example, Convention on Special Missions, art. 41.

[225] Because the VCDR is void on the specific duration within which the unwelcome diplomat needs to leave the country, the practice differs across states. It is common that expelled diplomats are given between twenty-four and seventy-two hours to leave the country.

[226] Paul Behrens, "In Praise of a Self-Contained Regime: Why the Vienna Convention on Diplomatic Relations Remains Important Today," in *Diplomatic Law in a New Millennium*, ed. Paul Behrens (Oxford University Press, 2017), 23–42.

[227] Denza, *Diplomatic Law*, 2016, 64.

its competent authority – usually the organization's head – can waive a protected official's immunity when requested. This practice is reflected in treaties and decisions of courts.[228] The doctrine of *persona non grata*, in the sense of the VCDR, however, applies to diplomatic representatives accredited by one state to another in the framework of bilateral relations and not to international organizations. Accordingly, it is generally considered the *persona non grata* proscription is not applicable to UN personnel. The United Nations is not a state, and its staff are not accredited to the countries in which they are stationed. The practice, however, has not been without controversies – in particular, surrounding the right of states to expel a UN official as an "unwelcome person." From the UN point of view, this doctrine is contrary to obligations under the UN Charter and the privileges and immunities accorded to the United Nations and its officials.[229] Notwithstanding, some governments have expelled a few members of the United Nations – in particular, some individuals on humanitarian missions.[230]

Heads of state and top-echelon state officials entitled to head-of-state immunity may also lose their immunity protection if the incumbent government decides to waive it.[231] The situation is a little less clear if there is a disagreement between the serving head of state and their government, such as when the latter wants to waive immunity, but the former is disinclined to accept the waiver. By analogy with diplomatic immunity,[232] "it could be assumed that as the immunity does not belong to the head of State as an

[228] District Court for the Southern District of New York, *United States v. Kuznetsov*, 442 F. Supp. 2d 102 (SDNY 2006).

[229] "Persona Non Grata Doctrine Not Applicable in Respect of United Nations Personnel, Secretary-General Stresses, Expressing Deep Regret over Somalia's Action," *UN Press Release*, January 4, 2019, SG/SM/19424 edition, https://press.un.org/en/2019/sgsm19424.doc.htm.

[230] Gozde Bayar, "UN Clarifies Position on Ethiopia's Expulsion of Humanitarian Officials," *Anadolu Agency*, October 1, 2021, www.aa.com.tr/en/africa/un-clarifies-position-on-ethiopias-expulsion-of-humanitarian-officials/2380694.

[231] International Court of Justice, *Judgment in Arrest Warrant*, ICJ Rep. 2002, 3 ("[T]hey will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity"), 61; Court of Appeals, *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987) ("[H]ead-of-state immunity is primarily an attribute of state sovereignty, not an individual right. Respect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity of Mr. and Mrs. Marcos"), 1111.

[232] Court of Appeals, *In re Grand Jury Proceedings*, 817 F.2d 1108 ("Related principles of diplomatic immunity support the conclusion that head-of-state immunity can be waived by the sovereign"), 1111; Court of Appeals, *In re Doe*, 860 F.2d 40 ("This conclusion is fortified by analogy to the related doctrines of diplomatic immunity and foreign sovereign immunity, from which head-of-state immunity evolved"), 45.

individual, the question is ultimately one for his or her State to decide in accordance with its constitution."[233] A waiver of immunity is acceptable by courts asserting jurisdiction over a foreign former head of state where neither the home government nor the government of the forum state assert or acknowledge such immunity to exist.[234]

The topic of waiver of immunity was addressed in the work of the ILC, which concluded with the text of draft article 11 being adopted provisionally by the commission at its seventy-second session in 2021. The text of this draft article endorses the immunity of state officials belongs to the state. It additionally stipulates a waiver must be express, be provided in writing, and cannot be revoked. It must be communicated through diplomatic channels or through other means established for that purpose, which "may include those provided for in applicable international cooperation and mutual legal assistance treaties."[235]

There are some notable cases of transnational crime when the sending state waived the immunity of its top officials, effectively surrendering them to the jurisdiction of a foreign court. An example is the case, *In re Grand Jury Proceedings*, in which a US federal circuit court honored the Philippine government's waiver of immunity of Ferdinand Marcos, the former president, and his wife, Imelda. The court rejected the Marcoses' argument that allowing a waiver would "degrade ex-rulers who happen to fall out of favor with their former constituents or political successors."[236] The court further noted that a reverse decision upholding the immunity of the Marcoses "would be . . . uncivilized, for it would allow disfavored ex-rulers to mock the existing government by claiming immunity in the name of that government."[237] The Marcoses were consequently found liable in a US civil court for failing to comply with federal grand jury subpoenas in connection with investigations of possible corruption in US companies' firearms contracts with the Philippines.[238]

[233] Foakes, *The Position of Heads of State and Senior Officials in International Law*, 98.

[234] Court of Appeals, *In re Doe*, 860 F.2d 40 ("[B]y issuing the waiver, the Philippine government has declared its decision to revoke an attribute of their former political positions; namely, head-of-state immunity"), 45; District Court for the Southern District of Florida, *Paul v. Avril*, 812 F. Supp. 207 (SD Fla 1993) (giving effect to Haiti's waiver of former president's immunity).

[235] Draft art. 11(3). See ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction, Texts and Titles of Draft Articles 8, 9, 10 and 11 Provisionally Adopted by the Drafting Committee at the Seventy-Second Session*, Document No. A/CN.4/L.953 (International Law Commission, 2021), Texts of Draft Articles 8, 9, 10 and 11 Provisionally Adopted by the ILC.

[236] Court of Appeals, *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111.

[237] Ibid.

[238] Ibid. (holding that head-of-state immunity is waivable at the behest of the sending state and accepting the Philippines government's waiver of whatever immunity Ferdinand and Imelda

In another noteworthy case, at the request of US authorities, the Secretary-General of the United Nations also lifted the immunities of several UN officers following allegations of corruption and mismanagement of the UN Oil-for-Food Programme in Iraq in 2005. This left Alexander Yakovlev, a senior contracts officer, and Vladimir Kuznetsov, a Russian diplomat who chaired the UN Budgetary Advisory Committee, to face the full force of the law and punishment by the US courts.[239] In a similar case of procurement bribery, a UN procurement officer, Sanjaya Bahel, had his immunity waived in relation to his sharing of insider information on the bidding process for UN contracts, and accepting things of value with an intent to be influenced or rewarded for the award of these contracts to companies associated with his long-term friends – a relationship he did not disclose.[240] An interesting spin on the case was when Bahel appealed the decision of the district court on grounds the UN waiver was not express. The appeals court disagreed, partially because it found the UN letter describing the waiver of Bahel's immunity satisfactory and because Bahel "himself impliedly waived any claim of immunity when he participated fully in the criminal proceedings without raising the issue of immunity until after the trial."[241]

The problem with lifting immunity through waivers is that sending states are under no binding obligation to waive the immunity of the state officials who represent them. There are many examples when sending states did not surrender immunity of their state officials to a foreign court.[242] Some scholars have admitted the system of waivers remain underutilized, possibly for political reasons.[243]

1.4.1.2 Implied Waiver

It has been argued that an international agreement, even if silent on the matter of waiver of immunity, may be interpreted to infer a state's tacit acceptance to waive its sovereign (state) immunity (and by extension the

Marcos may have enjoyed); also see Court of Appeals, *In re Doe*, 860 F.2d 40 (holding that "the Philippine government's waiver defeats appellants' claim to head-of-state immunity"), 50.

[239] District Court for the Southern District of New York, *United States v. Kuznetsov*, 442 F. Supp. 2d 102 (asserting immunity for prosecution for conspiracy to commit money laundering).

[240] Court of Appeals, *United States v. Bahel*, 662 F.3d 610 (2nd Cir. 2011).

[241] Ibid., 625.

[242] Tom Obokata, *Transnational Organised Crime in International Law*, Studies in International and Comparative Criminal Law 5 (Oxford and Portland: Hart Publishing, 2010), 73.

[243] Vandenberg and Bessell, "Diplomatic Immunity and the Abuse of Domestic Workers," 619.

immunity of state officials) for the conduct criminalized in the agreement.[244] According to the concept of an *implied waiver*, when states enter into an international treaty defining or recognizing a crime, and imposing the responsibility to punish it at the international level, they indirectly render such conduct logically irreconcilable with the upholding of foreign official immunity.[245] Suggestions have also been made that the *aut dedere aut judicare* obligation – the obligation to either extradite or prosecute persons who commit serious crimes – imposed on states through international treaties containing cooperation clauses could be interpreted to indicate a waiver of immunity (in situations where the state of the official does not exercise its jurisdiction) *sub silentio*.[246] This interpretation has become a bone of contention leading to a heated debate in policy and scholarly circles.

The question of implied waiver by treaty was one of the issues in *Pinochet* discussed in relation to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (henceforth "Torture Convention").[247] In this case, all seven Lords opined on some level whether immunity *ratione materiae* is implicitly excluded under the Torture Convention. Lord Saville, for example, argued that the *aut dedere aut judicare* regime under the Torture Convention could be used to deduce an exception to the immunity of a former head of state, whereby each state by becoming a party to the convention in effect agrees to either prosecute or extradite alleged torturers found within its jurisdiction.[248] He explained his position as follows:

> Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution. . . . So far as these countries at least are concerned it seems to me that from that date these state parties are in agreement with each other that the immunity *ratione materiae* of their former heads of state cannot be claimed in cases of alleged official torture.[249]

In support of this position, Lord Browne-Wilkinson reasoned that the "elaborate structure of universal jurisdiction" and the system under which there is no

[244] ILC, *Memorandum*, para. 258.
[245] See, for example, Roger O'Keefe, "The European Convention on State Immunity and International Crimes," *Cambridge Yearbook of European Legal Studies* 2 (1999): 513.
[246] ILC, *Seventh Report by Special Rapporteur Escobar Hernández*, para. 87.
[247] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984 (entered into force on June 26, 1987), 1456 UNTS 65.
[248] House of Lords, *Pinochet No. 3*, [1999] UKHL 17, reproduced in 38(3) ILM 581 (1999), 642.
[249] Ibid., 642–43.

safe haven for torture as envisioned by the Torture Convention could be construed as "abortive" of immunity of state officials in respect of torture.[250] Therefore, it would have to be the logical consequence of states adopting the convention to also consent to the non-application of jurisdictional immunity to states and foreign state officials that perpetrate torture.

While the position of implied waiver by treaty is laudable and is logical in view of the aim to end impunity for serious crimes, its realistic materialization is uncertain. Other Lords in *Pinochet* noted that the problem with the theory of implied waiver by treaty is that the implied consent of states parties to an international agreement is essentially a legal fiction.[251] As Lord Goff explained in his dissent, "This demonstrates how extraordinary it would be, and indeed what a trap would be created for the unwary, if state immunity could be waived in a treaty *sub silentio*. Common sense therefore supports the conclusion reached by principle and authority that this cannot be done."[252] In disagreement with the theory of implied waiver by treaty, in *Arrest Warrant*, the ICJ held immunities under customary international law were unaffected by numerous international treaties that compel states parties to extend their jurisdiction over particular offenses. The court reasoned as follows:

> ... although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law ... These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.[253]

The reasoning underlying the ICJ position is that sovereign (state) immunity cannot be affected by the ratification of a treaty if there is no such mention of it in the agreement in an explicit and direct form. As noted by Neil Boister, "[s]igning a suppression convention cannot be construed as consent to the removal of immunity for the transnational crime in question unless expressly provided" in the agreement.

Reflective of the controversial nature of implied waivers of immunity, the initial text of draft article 11 submitted by the ILC Special Rapporteur

[250] Ibid., 595.
[251] Campbell McLachlan, "Pinochet Revisited," *The International and Comparative Law Quarterly* 51, no. 4 (2002): 961.
[252] House of Lords, *Pinochet No. 3*, [1999] UKHL 17, reproduced in 38(3) ILM 581 (1999), 608.
[253] International Court of Justice, *Judgment in Arrest Warrant*, ICJ Rep. 2002, 3, para. 59.

to the Drafting Committee for its consideration included a clause that allowed for an implied waiver of immunity "deduced clearly and unequivocally from the treaty to which both the forum State and the State of the official are parties."[254] Following deliberations, this clause was removed.[255] In her remarks, however, the ILC Special Rapporteur Escobar Hernández indicated the willingness of the Drafting Committee to examine the possibility of using international treaties to strip state officials of immunity for egregious conduct that the treaties aim to prevent, suppress, and punish.[256] This outcome reflects some of the previous discussions at the ILC, such as those surrounding the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI)[257] adopted by the UN General Assembly in 2004 (not yet in force). This convention prohibits a state from invoking its sovereign (state) immunity rights before a court of another state to a matter or case "if it has expressly consented to the exercise of jurisdiction ... by international agreement; in a written contract; or a declaration before the court or by a written communication in a specific proceeding."[258]

1.4.2 *Exceptions to Immunity*

The matter of exceptions to foreign official immunity in instances when it may hinder efforts to combat impunity for international crimes, serious human rights violations, and the protection of the fundamental values of contemporary international law constitutes one of the most contested topics confronted by scholars and practitioners. Placed in the context of international and transnational crimes, these themes are discussed in the following sections. The focus is on the acts that can logically be covered by immunity, on the relationship between foreign official immunity and *jus cogens*, and on the distinction between official and private acts, among other issues.

[254] ILC, *Seventh Report by Special Rapporteur Escobar Hernández*, para. 103.
[255] ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction, Texts and Titles of Draft Articles 8, 9, 10 and 11 Provisionally Adopted by the Drafting Committee at the Seventy-Second Session*.
[256] ILC, *Report on the Work of the Seventy-First Session* (Chapter VIII "Immunity of State Officials from Foreign Criminal Jurisdiction"), Document No. A/74/10, paras. 119–201 (International Law Commission, 2019), para. 193.
[257] United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc A/RES/59/38 (2004) (not in force).
[258] Ibid., art. 7.

1.4.2.1 International Crimes

1.4.2.1.1 International Practice The category of *international crimes* or "crimes under international law" *stricto sensu* includes crimes under customary international law as well as treaty crimes concerning mass atrocities, such as genocide, crimes against humanity, and war crimes.[259] International criminal courts with a mandate to try perpetrators for international crimes generally do not recognize foreign official immunity. This is prompted by the severity of such affronts to the expectations upheld by the international community.

Two major developments in international criminal law in the twentieth century appear to have had an impact on such considerations. First is the adoption of the principle of individual criminal responsibility that is not constrained by foreign official immunity.[260] Principle III of the Nuremberg (Nürnberg) Principles, formulated by the ILC in response to the crimes committed by Nazi Germany leaders prosecuted at the Nuremberg trials in the aftermath of the Second World War, determines that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."[261] Article 7 of the Nuremberg Charter stipulates official positions of defendants do not absolve their responsibility for any of the crimes charged under the charter.[262] Second is the establishment of international criminal jurisdiction embodied by the ICC that recognizes no immunity for the crimes covered by the Rome Statute.[263] This view is enshrined in article 27(2) of the statute. It stipulates

[259] International Law Commission, *Memorandum by the Secretariat. Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/596, 2008, para. 12.

[260] Rosanne van Alebeek, "Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts," in *The Cambridge Handbook of Immunities and International Law*, eds. Luca Ferro, Nicolas Angelet, and Tom Ruys (Cambridge: Cambridge University Press, 2019), 519.

[261] Principle III in Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Yearbook of the International Law Commission, vol. II (1950).

[262] Charter of the International Military Tribunal annexed in the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279 (1945).

[263] Rome Statute of the International Criminal Court, July 17, 1998 (entered into force on July 1, 2002), 2187 UNTS 3.

the ICC will have jurisdiction over officials who may otherwise be protected with immunity from foreign criminal jurisdiction.[264]

Over the last two decades, several state leaders have been charged, prosecuted, and convicted by international courts for international crimes. One notable example is Charles Taylor, former President of Liberia (1997–2003), who was brought to the jurisdiction of the Special Court for Sierra Leone (SCSL) on charges of war crimes and crimes against humanity.[265] Taylor filed a complaint to quash his indictment and set aside the arrest warrant alleging he was protected by the head-of-state immunity (immunity *ratione personae*) and challenging the charges and the jurisdiction of the court over him. In so doing, he cited the ICJ judgment in *Arrest Warrant* – the case where the UN court affirmed absolute immunity of incumbent senior public officials and ruled in favor of the DRC whose minister for foreign affairs had been under a Belgium arrest warrant on allegations of war crimes and crimes against humanity.[266] The Appeals Chamber of the SCSL addressed these objections and decided against Taylor's immunity. It referred to article 6(2) of the Statute of the SCSL which stipulates "[t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[267] The major justification of the SCSL for this verdict was the international nature of the prosecuting institution. The court expanded on the distinction between domestic and international courts, making the case for the jurisdiction of the SCSL:[268]

[264] Rome Statute, art. 27(2) ("immunities or special procedural rules which may attach to the official capacity of a person . . . shall not bar the Court from exercising its jurisdiction over such a person").

[265] For the general and historical significance of the Taylor trial before the SCSL, see HRW, *"Even a 'Big Man' Must Face Justice:" Lessons from the Trial of Charles Taylor* (Human Rights Watch, 2012), www.hrw.org/report/2012/07/25/even-big-man-must-face-justice/lessons-trial-charles-taylor.

[266] Despite the fact that the ICJ upheld the immunity of a serving minister for foreign affairs, it noted incumbent state officials protected with immunity from foreign jurisdiction could nevertheless be subject to criminal proceedings before "certain international criminal courts." See International Court of Justice, *Judgment in Arrest Warrant*, 2002, ICJ Reports 2002, 3, para. 61.

[267] Statute of the Special Court for Sierra Leone in Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (with Statute), Freetown, January 16, 2002 (entered into force on April 12, 2002), 2178 UNTS 137, 147.

[268] For a scholarly commentary on the distinction between domestic and international criminal courts, see Sarah M. H. Nouwen, "The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued," *Leiden Journal of International Law* 18, no. 3 (2005): 651–52.

> the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.[269]

The court also referred to the opinion of Lord Slynn in *Pinochet* (No. 1) who argued:

> [there is] no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or Head of State or other official or diplomatic immunity when charges are brought before international tribunals.[270]

The court confirmed that the principle of the sovereign equality of states does not prevent a head of state from prosecution before an international criminal tribunal or court, and in so doing, did not deem it necessary to address situations in which immunity was successfully claimed before national courts, since the SCSL was not a national court.[271] This landmark decision was widely celebrated as a groundbreaking victory in the ongoing conflict between the long-established principles of state sovereignty and revisionist attempts to encroach on them in cases of international crimes.[272]

A similar outcome, albeit one related to functional rather than personal immunity, was reached by an international criminal court in *Blaškić*. The Appeals Chamber of the ICTY ruled immunity *ratione materiae* claimed by Tihomir Blaškić – a retired general of the Croatian Defense Council who served during the Bosnian War (1992–1995) – did not prevent prosecution in respect of the crimes under international law he was alleged to have

[269] Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I (2004), para. 49.

[270] Ibid., para. 52.

[271] The Appeals Chamber decision has been criticized for its failure to distinguish between personal and functional immunities. While the reasoning of the Chamber against Taylor was focused on the legal foundation of the special court, critics noted, as a sitting head of state Taylor could be recognized to have entitlements to immunity from prosecution of the SCSL. According to Miglin, from a legal standpoint, it would have been preferable if the Appeals Chamber had dismissed the indictment as a violation of Taylor's immunity *ratione personae* as a sitting head of state and proceeded with a subsequent indictment to prosecute Taylor when his term in office was over and he no longer enjoyed such immunity. See further in James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone," *Dalhousie Journal of Legal Studies* 16 (2007): 21.

[272] See, for example, Nouwen, "The Special Court for Sierra Leone and the Immunity of Taylor," 645. Despite its positive impact, Nouwen notes the excessive focus on the internationality of the court was "arbitrary" and "formalistic," suggesting a more appropriate justification for denying immunity could be to focus on the nature of the offense.

committed.[273] The *Blaškić* court expanded on the exceptions to the sovereign equality of states:

> These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.[274]

The most recent wave of decisions related to exceptions to foreign official immunity for international crimes issued by international criminal courts comes from the ICC in relation to the warrants for arrest and surrender of Sudan's now-former head of state, Al Bashir, for genocide, crimes against humanity, and war crimes perpetrated in Darfur. Its announcement against the then-incumbent Sudanese president caused anxiety throughout the international community and raised fundamental questions about the immunity of heads of state before international courts.[275] Central among these reservations was whether an incumbent head of state from a nonparty state to the Rome Statute is entitled to immunity before the ICC and whether states parties to the ICC would violate their obligations to other states if they arrested and surrendered a sitting head of state pursuant to a request from the ICC. The first question concerns the so-called vertical relationship between the ICC and the state of the accused. It inquires whether there exists a customary international legal norm that would lift the immunity of state officials of nonparty states of the ICC before the court. The second question relates to the horizontal relationship between states (interstate level) and calls for resolution on whether the ICC could compel its states parties to breach the obligations they would otherwise assume in their foreign relations with third states (nonparty states).[276]

The question of noncooperation[277] with the court in cases of its request for an arrest and surrender of sitting heads of state protected with immunity

[273] International Criminal Tribunal for the former Yugoslavia, *Trial Judgment in Blaškić*, Case No. IT-95-14, para. 41.

[274] Ibid.

[275] Kurt Mills, "'Bashir Is Dividing Us': Africa and the International Criminal Court," *Human Rights Quarterly* 34, no. 2 (2012): 404–47.

[276] Dapo Akande, "The Immunity of Heads of States of Nonparties in the Early Years of the ICC," *American Journal of International Law* 112 (2018): 173.

[277] Pursuant to article 86, "States Parties to the Rome Statute shall, in accordance with the provisions of the Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." Pursuant to article 89, "States Parties are obliged to execute the Court's pending orders for the arrest and surrender of a person."

ratione personae was addressed in a series of ICC decisions that feature a shortlist of countries – mostly African Union (AU) member states – which refused to arrest and surrender Al Bashir to the ICC during his official visits in their territories.[278] In a noncooperation case against the DRC, the ICC applied a legal theory suggesting Chapter VII of the UN Charter imposes an obligation on all UN member states to fully recognize the decisions of the UN Security Council. This means that when the Security Council issues a resolution referring a situation to the ICC as per article 13(b) of the Rome Statute,[279] the referral effectively functions as an implied waiver of any immunities of state officials before the ICC. With this reasoning, the ICC ruled against Al Bashir's immunity and against the DRC's claim that its obligation to cooperate with the ICC was subject to the court's ability to obtain a waiver of Al Bashir's immunity from Sudan as per article 98(1) of the Rome Statute.[280]

With this reasoning, Pre-Trial Chamber I concluded Al Bashir was not entitled to personal immunity (immunity *ratione personae*) under international law, because his immunity had been implicitly removed by the UN Security Council by means of its referral of the situation in Darfur to the ICC.[281] Accordingly, the court was under no obligation to ask for a waiver of immunity from Sudan, despite the fact that Sudan is a nonparty state to the Rome Statute, and notwithstanding that, under other conditions, it would not be compelled to cooperate with the ICC. This implies, rather paradoxically, that in a situation referred to the ICC by the Security Council, the immunity

[278] The power of the ICC to remedy cases of noncompliance is derived from article 87(7) of the Rome Statute, which provides: "[W]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

[279] Article 13(b) of the Rome Statute makes the ICC available to the UN Security Council as an instrument for maintaining or restoring international peace and security, removing the need for the Security Council to establish and maintain ad hoc courts for this purpose. For more details, see Alexandre Skander Galand, "Article 13 (b) vs State Sovereignty," in *UN Security Council Referrals to the International Criminal Court*, vol. 5, Leiden Studies on the Frontiers of International Law (Leiden, Netherlands: Brill Nijhoff, 2019), 47–103.

[280] Art. 98(1) of the Rome Statute grants states parties the right to refuse to cooperate with the ICC when doing so could contravene their obligations under international law before other (third) states. International Criminal Court, Pre-Trial Chamber I, *Prosecutor v. Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09 (2014), para. 18.

[281] International Criminal Court, Pre-Trial Chamber I, ICC-02/05-01/09, paras. 29–30.

of state officials of all UN member states, even nonparty states to the Rome Statute, is made irrelevant when it comes to prosecution before the ICC.[282]

In comparison to the implicit waiver reasoning embraced in the *DRC* decision, the *Chad*,[283] *Malawi*,[284] and *South Africa*[285] noncooperation judgments were fixated on the interpretation of the obligation to cooperate with the ICC as opposed to the customary commitment to respect the immunity of serving heads of state. All three countries provided legal justifications for why the ICC's request for the arrest and surrender of Al Bashir was incompatible with the immunity rules of customary international law. The essence of their claims was that the ICC cannot request its states parties to violate their obligations with respect to the rights of third states.[286] In its disagreement with these arguments, the ICC built on the *Taylor* decision, ruling that the international mandate of the court voids any clash with the principles underlying the immunity of state officials[287] and emphasizing the vertical relationship between the court vis-à-vis the state of the accused.[288] The *Malawi* decision further expanded on this reasoning:

> ... the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context. For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the

[282] Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities," *Journal of International Criminal Justice* 7, no. 2 (2009): 333.

[283] International Criminal Court, Pre-Trial Chamber I, *Prosecutor v. Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (2011).

[284] International Criminal Court, Pre-Trial Chamber I, *Prosecutor v. Al Bashir*, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (2011).

[285] International Criminal Court, Pre-Trial Chamber II, *Prosecutor v. Al Bashir*, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al Bashir, ICC-02/05-01/09 (2017).

[286] Rome Statute, art. 98(1).

[287] International Criminal Court, Pre-Trial Chamber I, *Corrigendum to the Decision on the Failure of Malawi to Comply with the Cooperation Request*, ICC-02/05-01/09, para. 33–34.

[288] Akande, "The Immunity of Heads of States of Nonparties in the Early Years of the ICC," 173.

> Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.[289]

In other words, the ICC cooperation regime with states parties (vertical relationship) is not equal to the interstate coordination system that exists between sovereign states (horizontal relationship). The *Malawi* and *Chad* decisions are thus instrumental in accenting the distinction between situations when states act for the purpose of their own domestic law enforcement rather than for the purpose of the ICC cooperation regime protected in article 13(b) of the Rome Statute. Where there is a referral of a situation to the ICC by the Security Council acting under Chapter VII of the UN Charter, states do not act on their own behalf but as instruments enforcing the *jus puniendi* ("the right to punish") of the international community.[290]

The court did not sufficiently explain the conflict between states' obligations to uphold immunity of incumbent heads of state and the arrest-and-surrender obligations before the court. The noncooperation proceedings against Jordan in *Al Bashir*, featuring the first non-African country to face a noncompliance process with the ICC, brought this question to the fore. The ICC ruled in *Jordan* that the exception to immunity in cases of international crimes before the ICC, as per article 27(2) of the Rome Statute, has attained the status of a norm of customary international law.[291] This historic decision gives no legal excuse to states parties to decline ICC cooperation requests on the grounds of immunity – "whether under national or international law."[292] Sitting political leaders of states parties to the Rome Statute, and nonparty states alike, do not have immunity before the ICC – neither upon a UN Security Council referral that requires the respective state to "fully cooperate" nor under customary international law. Stated differently, a nonparty state to the ICC is placed in the same position as a state party that is bound by article 27(2) of the Rome Statute. With this reasoning, because the nonparty state no longer enjoys immunities under international law in cases where the ICC has jurisdiction, a state party would not breach its international legal responsibilities to nonparty states by arresting and rendering the latter's head of state to the court.

Dapo Akande warns interpreting the customary obligation of states parties in this way may also mean that "parties to the Rome Statute, have, by creating

[289] International Criminal Court, Pre-Trial Chamber I, *Corrigendum to the Decision on the Failure of Malawi to Comply with the Cooperation Request*, ICC-02/05-01/09, paras. 42–43.
[290] Ibid., para. 46.
[291] International Criminal Court, Appeals Chamber, *Prosecutor v. Al Bashir*, Judgment in the Jordan Referral re Al Bashir Appeal, ICC-02/05-01/09-397 (2019).
[292] Rome Statute, art. 27(2).

the Court, taken away the rights of non-party states under international law."[293] In other words, this dauntless legal reasoning implies the ICC is authorized to start criminal proceedings against state officials of foreign countries suspected of international crimes irrespective of whether they still hold office of not, and whether they are officials of state parties or nonparty states. Adil Ahmad Haque also cautions cases of immunity of sitting heads of state before international courts like *Al Bashir* are scarce, which makes any claim for a customary rule renouncing foreign official immunity before international courts uncertain.[294]

With this criticism, it is little wonder the ICC's immunity-related decisions have strained the relations between the court and some countries, mainly AU states.[295] A testament to this is the Malabo Protocol,[296] which the AU drafted in 2014. It explicitly gives immunity from prosecution before the yet-to-be-established criminal chamber of the African Court of Justice and Human Rights (henceforth ACJHR or "African Court") to incumbent political leaders and senior state officials.[297] Article 46A *bis* of the protocol expressly states "no charges shall be commenced or continued before the court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office." This immunity clause has raised controversy and fears that it may possibly jeopardize the legitimacy of the ICC in its fight against impunity of perpetrators of atrocious crimes,[298] despite the

[293] Dapo Akande, "ICC Appeals Chamber Holds That Heads of State Have No Immunity under Customary International Law Before International Tribunals," *EJIL: Talk!*, May 6, 2019, n. p., www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/.

[294] Adil Ahmad Haque, "Head of State Immunity Is Too Important for the International Court of Justice," *Just Security*, February 24, 2020, n.p., www.justsecurity.org/68801/head-of-state-immunity-is-too-important-for-the-international-court-of-justice/.

[295] See, for example, Sascha-Dominick Bachmann and Naa Sowatey-Adjei, "The African Union-ICC Controversy before the ICJ: A Way Forward to Strengthen International Criminal Justice?" *Washington International Law Journal* 29, no. 2 (April 7, 2020): 247–301.

[296] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 27, 2014, AU Doc. EX.CL/846(XXV) (not yet in force).

[297] The Malabo Protocol, when ratified by fifteen member states (as of 2023, only ratified by fourteen AU member states), would grant criminal jurisdiction to the existing African Court on Human and Peoples' Rights (ACHPR), which has been merged with the Court of Justice of the African Union (which never came into existence) to create an African Court of Justice and Human Rights (ACJHR).

[298] For a further discussion of this topic, see, for example, Gino Naldi and Konstantinos D. Magliveras, "The International Criminal Court and the African Union: A Problematic Relationship," in *The International Criminal Court and Africa*, eds. Charles Chernor Jalloh and Ilias Bantekas (Oxford University Press, 2017), 111–37; Maxine Rubin, "Politicized

so-called regional complementarity principle alleged to be followed by the AU and the African Court.[299] Dire Tladi eloquently described the outcomes of the Malabo Protocol as the hero-villain impasse in which "supporters of the ICC see themselves as heroes and the AU as villains and the supporters of the AU see themselves as heroes and the ICC as villains."[300]

1.4.2.1.2 *National Practice* When it comes to national jurisdiction for international crimes, the practice has been exceptionally inconclusive and varied. Such lack of uniform application makes it impossible to ascertain a customary norm of foreign official immunity exception in cases of international crimes in national courts.

In some cases, national courts have recognized the exception to immunity in cases of international crimes. This has been the case in respect to the immunity accorded to former state officials (immunity *ratione materiae*). National judicial practice indeed indicates a trend toward accepting the existence of the exception to functional immunity in circumstances relating to international crimes. The "wind of change" in this direction is often tied to the groundbreaking decision in *Pinochet*. In this case, the United Kingdom's House of Lords examined the issue of immunity of Chile's general Augusto Pinochet and whether he could be extradited to Spain with a view to his subsequent prosecution on charges of widespread and systematic torture carried out in Chile while he was a serving head of state. The central question in the appeals case concluding the legal saga was whether Pinochet was entitled, as a former head of state, to the cloak of immunity *ratione materiae* for the charges advanced against him. In its consideration as to whether the international crime of torture could make an exemption to functional immunity, the court ruled against Pinochet's claims to functional immunity. This pioneering verdict indicated the crimes of torture and conspiracy to torture constitute an exception to functional immunity under international law.[301]

Different reasons to arrive at this outcome were articulated. Lords Browne-Wilkinson and Hutton contended an act that constitutes an international

Justice: Africa and the International Criminal Court," *International Journal of Transitional Justice* 14, no. 2 (July 1, 2020): 401–11.

[299] For details, see, for example, Sarah Nimigan, "The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity,'" *Journal of International Criminal Justice* 17, no. 5 (December 1, 2019): 1005–29.

[300] Dire Tladi, "The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff," *Journal of International Criminal Justice* 13, no. 1 (March 1, 2015): 17.

[301] House of Lords, *Pinochet No. 3*, [1999] UKHL 17, reproduced in 38(3) ILM 581 (1999).

crime cannot be construed as an official act.[302] Lord Browne-Wilkinson detailed his opinion on the matter as follows:

> Under the [Torture] Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials' immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive.[303]

Lord Hope pointed to the peremptory status (*jus cogens*) of the legal prohibition against torture, advancing the position that accountability for violations of any peremptory norms cannot take precedence over immunity. This compels "all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct."[304] Lord Millet noted, "[i]-nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose."[305] Lord Phillips went further, suggesting that along the hierarchy of norms, individual responsibility for international crimes would override immunity *ratione materiae* and the principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a another state.[306]

In her work, the ILC Special Rapporteur Escobar Hernández acknowledged a trend toward international acceptance of the exception to immunity *ratione materiae* for international crimes "either in view of the gravity of the crimes, because they violate peremptory norms or undermine values of the international community as a whole, or because the crimes in question cannot be regarded as official acts since they go beyond or do not correspond to the ordinary functions of the State."[307] To this end, the ILC proposed a draft article that restricts the application of immunity *ratione materiae* in a foreign

[302] Ibid., 595.
[303] Ibid.
[304] Ibid., 622.
[305] Ibid., 651.
[306] Ibid., 661.
[307] ILC, *Fifth Report by Special Rapporteur Escobar Hernández*, para. 121. It is noteworthy that the previous ILC Special Rapporteur Kolodkin concluded there is no customary norm (or trend toward the establishment of such a norm) in contemporary international law, adding restrictions on immunity *ratione materiae*, even *de lege ferenda*, were not "desirable" because they could impair the stability of international relations. See ILC, *Second Report by Special Rapporteur Kolodkin*, paras. 90–92.

criminal jurisdiction in respect to (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; and (f) enforced disappearance.[308] This international crimes exception to foreign official immunity, set forth in draft article 7, was put to a vote. It concluded with twenty-one votes cast in favor of its provisional adoption, one abstention, and eight negative votes.[309] With the positive vote on the adoption of draft article 7, however, almost 80 percent of the members of the ILC at the time expressed they were not prepared to approve the draft article as existing law (*lex lata*) and only supported the inclusion of the international crimes exception to immunity *ratione materiae* as a matter of the progressive development of international law (*lege ferenda*).[310] In the elaboration of his opinion on the vote, former ILC Rapporteur Kolodkin described draft article 7 as "quasi-legal theoretical premise," for which there does not exist "any real, discernible trend in State practice or international jurisprudence."[311]

In its deliberations on the topic, the ILC focused exclusively on criminal jurisdiction. The scope of immunity *ratione materiae* with regard to the acts of state officials is not the same for civil proceedings. Some domestic civil courts, mainly in common-law countries, have granted functional immunity to foreign state officials accused of international crimes. A few notable examples of such decisions are the 2006 UK House of Lords judgment in *Jones*.[312] In this case, which featured allegations of torture, proceedings were brought against Saudi Arabia and a few of its representatives, including the minister of interior. The House of Lords ruled Saudi Arabia was immune and rejected the claims against the individual defendants; Saudi Arabia's officials reasoned

[308] ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction, Texts and Titles of Draft Articles 8, 9, 10 and 11 Provisionally Adopted by the Drafting Committee at the Seventy-Second Session*. For the purposes of the present draft article, the ILC provides a list of treaties that serve as sources of definitions for the listed crimes.

[309] ILC, *Report on the Work of the Sixty-Ninth Session (Chapter VII "Immunity of State Officials from Foreign Criminal Jurisdiction")*, Document No. A/72/10, paras. 68–141 (International Law Commission, 2017), para. 74. For a detailed review of the voting process and positions, see Rosanne van Alebeek, "The 'International Crime' Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?" *American Journal of International Law* 112 (2018): 27–32.

[310] Alebeek, "The 'International Crime' Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?" 30.

[311] ILC, *Provisional Summary Record of the 3378th Meeting (Sixty-Ninth Session, Second Part)*, Document No. A/CN.4/SR.3378 (International Law Commission, 2017), 9.

[312] House of Lords, *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia and Others*, [2006] UKHL 26 ("The foreign State's right to immunity cannot be circumvented by suing its servants or agents"), para. 10.

their actions were attributable to the state and as such were immune from foreign jurisdiction. The court stressed neither the *jus cogens* character of the prohibition of torture nor the fact that it is an international crime eliminated a state's claim to immunity from the civil jurisdiction of another state's courts. Other notable cases that recognize no exception to immunity of state officials for international crimes in civil proceedings are *Fang v. Jiang* in New Zealand,[313] *Belhas v. Moshe Ya'alon* in the United States,[314] *Zhang v. Zemin* in Australia,[315] and *Kazemi Estate v. Islamic Republic of Iran* in Canada.[316]

In an opposite direction, other decisions of national courts in civil proceedings supported the exception to immunity in cases of international crimes committed by state officials purporting immunity *ratione materiae*. Worthy of mention is the 2004 *Ferrini* judgment. In this civil case, Italian worker Luigi Ferrini claimed damages against Germany for deporting him from occupied Italy and forcing him to work in Germany during the Second World War. The Italian Supreme Court of Cassation found state officials do not enjoy functional immunity for crimes under international law.[317] Similarly, in a landmark decision in *Samantar*, a US district court deferred to the State Department's submission that a former prime minister and defense minister of Somalia did not enjoy immunity from civil jurisdiction where allegations of torture had been made.[318]

Having briefly canvassed pertinent international and national cases, a few concluding observations should be made. First, there exists a trend in domestic criminal courts toward maintaining immunity *ratione personae* but

[313] High Court of New Zealand, *Fang v. Jiang*, [2007] NZAR 420 ("The Torture Convention provides very carefully for universal criminal jurisdiction in cases of alleged torture but does not do so for civil proceedings"), para. 64 (citing *Jones v. Saudi Arabia* [2006] UKHL 26 on appeal from [2004] EWCA Civ 1394).

[314] Court of Appeals, *Belhas v. Moshe Ya'alon*, 515 F.3d 1279 (DC Cir. 2008) (holding that a complaint brought against a retired general of the Israeli Defense Forces was properly dismissed for failing to meet the jurisdictional prerequisites contained in the FSIA).

[315] Court of Appeal of New South Wales, *Zhang v. Zemin*, [2010] NSWCA 255 (holding there was no universal jurisdiction for torture in regard to civil claims).

[316] Supreme Court, *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 SCR 176 ("While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate and is also very likely a principle of fundamental justice, the peremptory norm prohibiting torture has not yet created an exception to state immunity from civil liability in cases of torture committed abroad").

[317] Supreme Court of Cassation, *Ferrini v. Federal Republic of Germany*, Judgment, Case No. 5044/04, ILDC 19 (IT 2004). Also see Finke, "Sovereign Immunity," 853–54, 860.

[318] Court of Appeals, *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012).

rejecting immunity *ratione materiae* when prosecuting individuals charged with international crimes. The inclusion of international crimes into an exception to immunity *ratione materiae*, however, has not given rise to a custom-based limitation and has not been unanimously supported by state practice.[319] Second, there is a considerable body of authority, although not without exceptions, denying the existence of civil jurisdiction in cases of immunity *ratione materiae* for international crimes, despite the recognition of the prohibition of such crimes as *jus cogens* norm of general international law.

The ILC's approach in draft article 7 that exempts six international crimes from the purview of immunity *ratione materiae* indicates a notable progressive development of international law. Despite the lack of consensus on the topic at the ILC, by taking the *jus cogens* or peremptory norms route, the ILC Special Rapporteur Escobar Hernández has progressively justified carving out an exception to immunity *ratione materiae* for international crimes. This protects the major advancements in international criminal law of the past few decades. In particular, it advances the efforts by the international community to end impunity for the most serious violations of international criminal law. This is in harmony with the ILC's Third Report on Peremptory Norms of General International Law (*Jus Cogens*), where Special Rapporteur Dire Tladi validates a *jus cogens* exception to immunity of officials *ratione materiae*:

> ... (c) the fact that an act in violation of an offence prohibited by a peremptory norm of general international law (*jus cogens*) was committed by a person holding an official position shall not constitute a ground excluding criminal responsibility.
>
> (d) immunity *ratione materiae* does not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*).[320]

1.4.2.2 Transnational Crimes

Whereas there is a strong trend toward acceptance of an exception to immunity *ratione materiae* for international crimes, no such exception is recognized

[319] ILC, *Fifth Report by Special Rapporteur Escobar Hernández*, para. 223.

[320] ILC, *Third Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur*, Document No. A/CN.4/714 (International Law Commission, 2018), para. 132.

to exist for transnational crimes, no matter how egregious the offense. In the Fifth Report, the ILC Special Rapporteur Escobar Hernández proposed the suppression obligations introduced by multilateral anti-corruption treaties, most notably UNCAC, might make it appropriate to include a provision in the draft articles that expressly defines corruption as an exception to the immunity of state officials from foreign criminal jurisdiction.[321] Several members backed this suggestion, pointing out that corruption, particularly grand corruption, has a negative impact on the stability and security of states and the international community.[322] They also highlighted the complex and often indistinguishable boundary between official and private acts in situations of corruption, such as when an act is made for an ulterior personal purpose but is attributed to the state as an act performed in an official capacity.[323] In response, some members of the ILC pointed out domestic courts had already created a precedent of rejecting claims of functional immunity in corruption cases because corruption could never be considered an official act.[324] From this perspective, immunity *ratione materiae* does not pose an obstacle to the prosecution of protected officials complicit in corruption, among other transnational crimes, because crimes motivated by pecuniary gain are generally regarded as acts of a private nature.[325] Accordingly, one could argue corruption is already implicitly excluded from the scope of immunity *ratione materiae* in draft article 6(1) of the ILC that stipulates state officials enjoy functional immunity only for acts committed while acting in their official capacity.[326] If so, there is no need to include an explicit corruption-related exception to functional immunity in draft article 7. Ultimately, only six international crimes were included in draft article 7 (Table 1.2).

This decision of the commission was not without criticism. Some members reproached the absence of a set of predetermined criteria for the inclusion of specific crimes as an exception to immunity *ratione materiae* (e.g., crimes that could only be committed by governments; crimes whose prohibition concerned peremptory norms of international law; crimes listed in the Rome

[321] ILC, *Fifth Report by Special Rapporteur Escobar Hernández*, para. 234.
[322] ILC, *Provisional Summary Record of the 3378th Meeting*, 6–7.
[323] Ibid.
[324] ILC, *Report A/72/10*, para. 124.
[325] Ibid., para. 123.
[326] Ibid.

TABLE 1.2. *Comparison of texts of draft article 7 (crimes under international law in respect of which immunity* ratione materiae *shall not apply) proposed by the ILC Special Rapporteur and adopted by the commission*

Draft Article 7	
Text proposed by the Special Rapporteur	Text adopted by the ILC
Crimes in respect of which immunity does not apply 1. Immunity shall not apply in relation to the following crimes: (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances; (ii) Corruption-related crimes; (iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed. 2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office. 3. Paragraphs 1 and 2 are without prejudice to: (i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable; (ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State.[327]	Crimes under international law in respect of which immunity *ratione materiae* shall not apply 1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance. 2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.[328]

Statute; or crimes subject to a conventional *aut dedere aut judicare* regime),[329] suggesting the decision was based on "preferences and choices rather than legal or policy reasons."[330]

[327] ILC, *Fifth Report by Special Rapporteur Escobar Hernández*, Annex III.
[328] ILC, *Titles of Parts Two and Three, and Texts and Titles of Draft Article 7 and Annex Provisionally Adopted by the Drafting Committee at the Sixty-Ninth Session*, Document No. A/CN.4/L.893 (International Law Commission, 2021), 7.
[329] ILC, *Provisional Summary Record of the 3378th Meeting*, 6.
[330] Ibid., 12 (Aniruddha Rajput).

It could be argued the distinction between international and transnational crimes from the point of view of immunity is insignificant.[331] Charles C. Jalloh notes the existing definitions of these two categories of crimes "impl[y] that there is greater clarity than actually exists regarding what specific offences fall into these seemingly impermeable categories, their origins or sources, and the criteria for their inclusion in one basket or the other, and in some cases, not at all."[332] Transnational crimes constitute major threats to national and international security, including those with grave consequences for public safety, public health, democratic institutions, economic stability, and human rights.[333] For instance, trafficking in persons may be so atrocious it has been argued to constitute a crime against humanity.[334] To that end, the Rome Statute makes an explicit reference to the crime of trafficking in persons as an *actus reus* of crimes against humanity under the enslavement provision in article 7.[335] The references in the Rome Statute to sexual slavery, enforced prostitution, and other forms of sexual violence[336] are also of relevance in identifying trafficking in persons as a crime against humanity.[337] Arguably, in most aggravated cases of trafficking in persons, the organized manner of this crime implicating state agents may qualify as a "widespread or systematic attack directed against [a] civilian population," which satisfies the severity requirement set forth in article 7 of the Rome Statute.[338] Finally, in the context of article 7(1)(k) of the Rome Statute, there may also exist compelling justification to prosecute grand corruption as a crime against humanity, where it is the cause of "great suffering, or serious injury to body or to mental or physical health." There are concerns, however, that equating corruption with

[331] Wharton, "Redrawing the Line?"

[332] Chernor Jalloh, "The Nature of the Crimes in the African Criminal Court," 800.

[333] See, for example, "United States Strategy to Combat Transnational Organized Crime" (Washington, DC: The White House, 2011).

[334] Tom Obokata, "Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System," *The International and Comparative Law Quarterly* 54, no. 2 (2005): 445–57; Paul V. I. Sidlawinde Karenga, "International Criminal Law and Trafficking in Persons," in *A West African Model to Address Human Trafficking* (Cham: Springer International Publishing, 2022), 211–25; Nadia Alhadi, "Increasing Case Traffic: Expanding the International Criminal Court's Focus on Human Trafficking Cases," *Michigan Journal of International Law* 41, no. 3 (August 1, 2020): 541–80.

[335] Rome Statute, arts. 7(1)(c) and 7(2)(c).

[336] Ibid., art. 7(1)(g).

[337] For a general discussion on the topic, see Joshua Nathan Aston, *Trafficking of Women and Children: Article 7 of the Rome Statute*, 1st ed. (New Delhi, India: Oxford University Press, 2016).

[338] Alhadi, "Increasing Case Traffic: Expanding the International Criminal Court's Focus on Human Trafficking Cases."

crimes against humanity may be impractical, since the devastation wrought by even the most aggravated cases of grand corruption is often less obvious than that of murder, extermination, or torture.

At the time of the negotiations of the Rome Statute, states considered incorporating a few transnational crimes into the mandate of the ICC. Specifically, drug trafficking and terrorism were incorporated into the 1994 draft articles with a commentary explaining that large-scale drug trafficking is of "undeniable international concern" and within the threshold of the required "exceptionally serious character."[339] In 1989, Trinidad and Tobago called for the court to expand its jurisdiction over trafficking in drugs.[340] In 2009, a representative of the delegation of this Caribbean island country again proposed addressing the "menace of international drug trafficking . . . of increasingly grave concern to many States" through the ICC.[341] At the time, political and pragmatic considerations overtook the negotiations of the Rome

[339] Article 20 of the Draft Statute of the International Criminal Court of 1994 provided jurisdiction for the following crimes: the crime of genocide, the crime of aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and "crimes, established under or pursuant to the treaty provisions listed in the Annex, which having regard to the conduct alleged, constitute exceptionally serious crimes of international concern." The Annex lists the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, thus specifically bringing drug trafficking offenses as envisaged by its article 3(1) inside the jurisdiction of the ICC. See ILC, *Draft Statute for an International Criminal Court (Included in the Report of the International Law Commission on the Work of Its Forty-Sixth Session)*, Document No. A/CN.4/L.491/Rev.2 (International Law Commission, 1994), para. 22. Also see Neil Boister, "The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics," *Journal of Armed Conflict Law* 3, no. 1 (1998): 27–43; Wharton, "Redrawing the Line?"

[340] Letter from the Permanent Representative of Trinidad and Tobago to the Secretary-General, UN GAOR, 44th Session, Annex 44, Agenda Item 152, UN Doc. A/44/195 (August 21, 1989). Also see the recommendation of Trinidad and Tobago to include drug trafficking into the mandate of the ICC discussed in the context in Heather L. Kiefer, "Just Say No: The Case against Expanding the International Criminal Court's Jurisdiction to Include Drug Trafficking," *Loyola of Los Angeles International and Comparative Law Journal* 31, no. 2 (2009): 166; Yvonne M. Dutton, "Explaining State Commitment to the International Criminal Court: Strong Enforcement Mechanisms as a Credible Threat," *Washington University Global Studies Law Review* 10, no. 3 (January 1, 2011): 486; Sara Wharton and Robert J Currie, "Transnational Criminal Courts: A Partially Realized Idea," in *Histories of Transnational Criminal Law*, eds. Neil Boister, Sabine Gless, and Florian Jeßberger (Oxford University Press, 2021), 109–11.

[341] "Statement by Mr. Eden Charles" (The Hague: Eighth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, November 18, 2009), 3–4, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-Trinidad%20and%20Tobago-ENG.pdf.

Statute, ultimately preventing the offense of drug trafficking from entering the substantive jurisdiction of the ICC.[342]

As of yet, there exists no international court with a substantive jurisdiction over transnational crimes. This said, there have been a few notable attempts to create one.[343] It is worth mentioning the most recent and only partially realized Malabo Protocol. It blends "international" and "transnational" crimes in a single treaty establishing a criminal chamber of the African Court. The protocol contains a list of fourteen crimes organized into the four broad classes: (a) "transnational" crimes (piracy; mercenarism; money laundering; trafficking in persons; trafficking in hazardous wastes; illicit exploitation of natural resources); (b) "partly transnational" crimes (corruption); (c) "partly international crimes" (terrorism; unconstitutional change of government); and (d) "international crimes" (the crime of aggression; genocide; crimes against humanity; war crimes).[344] The "eclectic mix"[345] presented in the yet-to-be-in-force protocol is arguably motivated by the aspiration of the AU to change international law in a progressive way to help meet the specific needs of the African continent. The definitions of the crimes included in the protocol are drawn from the criminal provisions of existing – regional and international treaties – that criminalize them. This shows a close-knit connection between the existing crime suppression regime and the proposed criminal chamber of the African Court. Although there are no clear criteria or doctrinal frameworks that inform the inclusion or exclusion of certain crimes,[346] the progressive legal thinking embraced in the Malabo Protocol indicates a piecemeal movement toward a more inclusive international legal regime concerned with countering the crimes of international concern. This approach does not separate international crimes from transnational crimes, thereby implicitly questioning the conventional divorce between these categories of crime.

[342] Boister, "The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court," 30.

[343] Wharton and Currie, "Transnational Criminal Courts."

[344] Charles C. Jalloh, "A Classification of the Crimes in the Malabo Protocol," in *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, eds. Charles C. Jalloh, Kamari M. Clarke, and Vincent O. Nmehielle (Cambridge: Cambridge University Press, 2019), 239.

[345] Ibid., 237.

[346] The Malabo Protocol has been criticized for the unexplained omission of trafficking in small arms, migrant smuggling, and trafficking in wildlife. See Neil Boister, "Transnational Crimes Jurisdiction of the Criminal Chamber of the African Court of Justice and Human and Peoples' Rights," in *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, ed. Charles C. Jalloh, Kamari M. Clarke, and Vincent O. Nmehielle (Cambridge: Cambridge University Press, 2019), 341–42.

Be that as it may, such progressive legal thinking is, for the time being, only reflected on paper – embraced in the protocol that may or may not come into force.[347]

CONCLUSION

Foreign official immunity is a long-recognized doctrine of international law that shields public officials from foreign jurisdiction, protecting them – with some variation depending on such factors as rank, tenure, and the nature of the act in question – from suit in foreign courts, from search and arrest, and from other coercive measures that may interfere with the performance of their official functions. Under international customary law, incumbent heads of state, heads of government, and ministers for foreign affairs enjoy absolute immunity (immunity *ratione personae*), which grants them absolute freedom from foreign jurisdiction. According to the treaties governing diplomatic relations, serving senior diplomats also enjoy a blanket immunity (immunity *ratione personae*). Meanwhile, consuls only have immunity for official acts. Other current and former foreign officials are entitled to functional immunity (immunity *ratione materiae*) that protects this broad category of officials from proceedings in a foreign court in relation to their conduct while serving in their official capacity.

Although immunity *ratione personae* is absolute, there has been a surge in attempts to bring protected state officials to account for serious crimes under international law. There has emerged a high degree of international consensus that some acts should not be covered by personal immunity and cannot be construed as official acts. The debate on exceptions to foreign official immunity is ongoing, although the consensus may be tilting toward "less recognition of immunities and more recognition of exceptions to immunities."[348] Despite the strong attachment in the jurisprudence of national courts to the doctrines of state sovereignty, comity, and reciprocity, which have shaped the political, social, and legal thinking for centuries, distinguished efforts toward individual criminal accountability of state officials for the most heinous crimes under international law have been made by international and national courts. They indicate a robust move away from absolute, "princely" immunity and toward

[347] For some critical comments on the prospects of the implementation of the Malabo Protocol, see Wharton and Currie, "Transnational Criminal Courts," 112–13.

[348] Dire Tladi, "The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?" *Leiden Journal of International Law* 32, no. 1 (March 2019): 170.

its more narrow, functional application, with the idea that "leaders, knowing that immunity will not protect them against accountability, will think twice before committing crimes against their own populations"[349] This palpable quest for individual criminal liability for international crimes is likely to alter the nature of the legal regime of foreign official immunity, its character and application, and certainly the politics surrounding it. Progressive anti-impunity steps have already been made in the realm of individual criminal accountability for international crimes, particularly at the ICC – the court where immunity of either former or sitting heads of state can be invoked to oppose a prosecution. National jurisprudence, however, shows that the swelling pursuit of accountability for international crimes in the past few decades has not completely dismantled the long-established doctrinal bastion of foreign official immunity. Rather, it only marks a path toward the relaxation of the old barriers.

Compared to a vast, overflowing literature on the topic of foreign official immunity for international crimes, efforts to end impunity of state officials for transnational crimes have attracted only limited attention. Based on the drafting discussions within the ILC and its draft article 7, it may be inferred that the ILC proposed a clear-cut exception to jurisdictional immunity for international crimes and a "quasi exception" for transnational crimes. The latter means transnational crime could never be considered an official act or an act undertaken in an official role, because such acts are always committed with an eye to private gain. Accordingly, transnational crimes are already implicitly excluded from the scope of immunity *ratione materiae*. The challenge for courts in such cases is to separate the official and private elements of the criminal act in question to establish whether the immunity entitlement applies. To take transnational crime out of the conduct covered by functional immunity, one needs to be able to determine clearly whether the act concerned is official or private. Doing so in situations where the criminal act in question was only capable of being committed due to the official status of the offender, or their ability to take advantage of the state apparatus, and through the means or acts that are undoubtedly official constitutes one of the major challenges. This and other issues are unveiled in a detailed analysis of the application of foreign official immunity, and limits thereto, in cases of trafficking in persons (Chapter 2), corruption and money laundering (Chapter 3), and drug trafficking (Chapter 4).

[349] Ibid.